No. 04-631

Title: Joan Wagnon, Secretary, Kansas Department of Revenue, Petitioner
v.
Prairie Band Potawatomi Nation

Docketed: November 10, 2004

Lower Ct: United States Court of Appeals for the Tenth Circuit

Case Nos.: (03-3218)

Decision Date: August 11, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 5 2004	Petition for a writ of certiorari filed. (Response due December 10, 2004)
Nov 15 2004	Waiver of right of respondent Prairie Band Potawatomi Nation to respond filed.
Nov 17 2004	DISTRIBUTED for Conference of December 3, 2004.
Nov 24 2004	Brief amicus curiae of Multistate Tax Commission filed.
Nov 26 2004	Response Requested . (Due December 27, 2004)
Dec 10 2004	Order extending time to file response to petition to and including January 26, 2005.
Jan 25 2005	Brief amici curiae of South Dakota, et al. filed.
Jan 26 2005	Brief of respondent Prairie Band Potawatomi Nation in opposition filed.
Feb 4 2005	Reply of petitioner Stephen S. Richards, Secretary, Kansas Department of Revenue filed.
Feb 9 2005	DISTRIBUTED for Conference of February 25, 2005.
Feb 28 2005	Petition GRANTED.
Mar 31 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 12, 2005. Extension of time within which to file respondent's brief on the merits to and including July 14, 2005.
May 4 2005	Brief amicus curiae of Multistate Tax Commission filed.
May 12 2005	Joint appendix filed.
May 12 2005	Brief of petitioner Stephen S. Richards, Secretary, Kansas Department of Revenue filed.
May 12 2005	Brief amici curiae of National Association of Convenience Stores, et al. filed.
May 12 2005	Brief amici curiae of South Dakota, et al. filed.
Jul 7 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents
Jul 13 2005	Brief amici curiae of Hoopa Valley Tribe and Colorado River Indian Tribes (Distributed)

Jul 14 2005	Brief of respondent Prairie Band Potawatomi Nation filed. (Distributed)
Jul 14 2005	Brief amicus curiae of Inter-Tribal Transportation Association filed. (Distributed)
Jul 14 2005	Brief amici curiae of National Intertribal Tax Alliance, et al. filed. (Distributed)
Jul 14 2005	Brief amici curiae of Sac and Fox Nation of Missouri in Kansas and Nebraska, et al. filed. (Distributed)
Jul 14 2005	Brief amicus curiae of United States filed. (Distributed)
Jul 18 2005	Brief amici curiae of NCAI, Confederated Tribes of the Warm Springs Reservation, et al. filed. (Distributed).
Jul 20 2005	CIRCULATED.
Jul 29 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 3 2005	Record received from U.S.C.A. for Tenth Circuit. (1 box)
Aug 15 2005	Reply of petitioner Stephen S. Richards, Secretary, Kansas Department of Revenue filed. (Distributed)
Aug 18 2005	Record received from U.S.D.C. for District of Kansas. (1 box)
Aug 23 2005	SET FOR ARGUMENT on Monday, October 3, 2005.
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 3 2005	Argued. For petitioner: Theodore B. Olson, Washington, D.C. For respondent: Ian Heath Gershengorn, Washington, D.C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.)

Supreme Court, U.S.
FILED
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No. 04-631

In The

Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) When a State taxes the receipt of fuel by non-tribal distributors, manufacturers and importers, and such receipt occurs off-reservation, does the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), apply because the fuel is later sold by a tribe to final consumers?

2) Should the Court abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent?

3) Did the court of appeals err in applying the *White Mountain Apache* interest balancing test by, *inter alia*, placing dispositive weight on the fact that a tribally-owned gas station derives income from largely non-tribal patrons of the tribe's nearby casino?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
I. The Court of Appeals' Decision Directly Conflicts with Controlling Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Sharp Schism With Other Federal Circuit Courts of Appeals and One State Supreme Court	5
II. The Perpetual Uncertainty in Lines of Demarcation and Lack of Meaningful, Clear Guidance that is Absolutely Critical to States in the area of Taxation, Dictates That the *White Mountain Apache* Balancing Test Be Replaced in the Taxation Context with a Preemption Analysis Based on the Principle that Indian Immunities are Dependent Upon Congressional Intent	10

TABLE OF CONTENTS – Continued

	Page
III. In Sharp Contrast to Decisions from Other Circuits, and Contrary to Controlling Precedent from This Court, the Court of Appeals' Decision Wrongly Placed the Tribe's Economic Interest in a Position Superior to the State's Strong, Fundamental Interest in its System of Off-reservation Taxation	20
APPENDIX	24

TABLE OF AUTHORITIES

Page

CASES

Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) 14

Blunk v. Ariz. Dep't of Transp., 177 F.3d 879 (9th Cir. 1999) 7

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 16, 20

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) 23

Dows v. Chicago, 11 Wall. 108 (1871) 8

Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996) 15

Hicks v. Miranda, 422 U.S. 332 (1975) 8

In re Blue Lake Forest Prods., Inc., 30 F.3d 1138 (9th Cir. 1994) 7

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 6, 7, 9, 10

Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908 (1st Cir. 1996) 7

National Private Truck Council, Inc. v. Oklahoma Tax Com'n, 515 U.S. 582 (1995) 8

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 6

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 14, 17, 19, 20

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 19

TABLE OF AUTHORITIES – Continued

Page

Rodey v. State, 107 N.M. 399, 759 P.2d 186 (1988) 8

Rodey v. State, 490 U.S. 1043 (1989) 8

Sac and Fox v. Pierce, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) 18, 23

Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995) 15

United States v. New Mexico, 455 U.S. 720 (1983) 14, 19

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) ..... *passim*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) 11, 13, 14

CONSTITUTIONAL PROVISION

U.S. Const. Art. I, § 8, cl. 3 1

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1362 3

28 U.S.C. § 1367(a) 3

Kan. Stat. Ann. § 79-3402 ..... 1, 22

Kan. Stat. Ann. § 79-3408(a) 2

Kan. Stat. Ann. § 79-3408(c) 2, 3

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 10(a) 8

Supreme Court Rule 13.1 1

OPINIONS BELOW

The August 11, 2004, decision of the United States Court of Appeals for the Tenth Circuit is reported at 379 F.3d 979 (10th Cir. 2004), and is included in the petition appendix. The decisions of the District Court are reported at 241 F. Supp. 2d 1295 (D. Kan. 2003), and 2003 WL 21536881 (D. Kan. 2003). These decisions are included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision in this case on August 11, 2004. This petition has been filed within ninety (90) days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

Kan. Stat. Ann. § 79-3402 (1997) provides that

> The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing

> and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever.

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) provides that:

> A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) provides that:

> Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein. . . .

STATEMENT

1. *Nature of the Suit*. Kansas imposes a tax on the receipt of motor fuel by distributors, manufacturers and importers for use, sale or delivery in Kansas for any purpose whatsoever. Kan. Stat. Ann. § 79-3408(a) (Supp. 2003). Distributors, importers and manufacturers, not retailers or ultimate consumers, bear the tax's legal incidence and are responsible for remitting it to the State. *Id.* § 79-3408(c) (Supp. 2003). When the Kansas Department of Revenue attempted to collect the tax with respect to motor fuel received by the tribe's distributor off-reservation, the respondent (a federally-recognized tribe) filed suit in federal court. The tribe sought declaratory and injunctive relief against the Secretary of the Kansas Department of Revenue in his official capacity. The tribe invoked the court's jurisdiction under 28 U.S.C. §§ 1331, 1362, and 1367(a).

2. *The District Court Proceedings*. The District Court granted the Secretary's Motion for Summary Judgment and denied the tribe's request for reconsideration. Pet. App. 23.

In making these rulings, the District Court held:

a. The State has a fundamental, sovereign interest in its system of taxation. Pet. App. 52.

b. The legal incidence of the State tax at issue falls on the distributor, not the tribal retailer. Pet. App. 45.

c. Because the State exercised its tax jurisdiction off-reservation, the State's interests were at their strongest and exceeded the economic interests of the tribe which were, comparatively, at their weakest. Pet. App. 47-48.

d. The State provides services to the taxpayer (the fuel distributor), chief among which is a four-lane State Highway 75 used to access the tribe's gasoline station. Pet. App. 48.

e. Simply selling finished gasoline near the tribe's casino does not generate value on the reservation sufficient to supersede the State's interest in its system of off-reservation taxation. Pet. App. 47.

3. *The Court of Appeals' Decision.* The Court of Appeals, reviewing the District Court's decision *de novo*, reversed. Pet. App. 1.

a. Whether the balance-of-interests test is appropriate when a State exercises jurisdiction off-reservation.

The Court of Appeals concluded that the balance-of-interests test is appropriate to analyze, and ultimately strike, the State tax imposed off-reservation. Pet. App. 6.

b. Abandonment of balance-of-interests test.

The Court of Appeals concluded that circuit precedent precluded their addressing the State's request to abandon the balance-of-interests test. Pet. App. 7.

c. The Court of Appeals' balancing.

The Court of Appeals acknowledged that the State tax was imposed off-reservation against a non-tribal member (*i.e.* the distributor), Pet. App. 5, but nevertheless concluded, that the Kansas tax, as applied, is preempted by implication as incompatible with and outweighed by the strong tribal and federal interests against the tax. The tribal and federal interests noted by the court were the generalized interest in economic viability of the tribe. Pet. App. 12-13. The Court of Appeals principally relied upon the fact that approximately three-quarters of the tribal gas station's customers were either casino patrons or employees and that the station's revenues therefore were, "'derived from value generated on the reservation by

activities involving the tribes and when the taxpayer is the recipient of tribal services.'" Pet. App. 7-8 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156-57 (1980)). Additionally, the Court of Appeals distinguished this Court's decision in *Colville* because the tribe maintains a one-and-a-half mile access road from State Highway 75 to the tribe's gas station, Pet. App. 11, and because the tribe sold its gasoline within two cents of the prevailing local market rate, Pet. App. 9-10.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Directly Conflicts with Controlling Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Sharp Schism With Other Federal Circuit Courts of Appeals and One State Supreme Court.

The Court of Appeals determined that a nondiscriminatory state tax, imposed off-reservation on non-tribal entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes, is preempted under the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

As a practical matter, the Court of Appeals has now invoked preemption-by-implication as an appropriate standard to reach beyond a tribe's geographical reservation boundary and strike an otherwise lawful, nondiscriminatory State tax imposed off-reservation. This was error.

White Mountain Apache, however, involved the on-reservation activity of a non-Indian company. This Court addressed only the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis that embodies the balance-of-interests test. This Court thus cited the settled rule three years later in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,'" *id.* at 335 n.18, and, as a result, held that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary,'" *id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148-49 (1973)).

Given *White Mountain Apache's* express recognition of that rule, states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, even against tribes or their members without reference to an *ad hoc* and amorphous test used to resolve the validity of on-reservation state taxation of nonmembers doing business with tribal entities. *See Mescalero Apache Tribe,* 411 U.S. at 148-49 ("State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). This basic tenet applies equally to State taxation. *Id.* at 149.

The Court of Appeals' decision significantly, and wrongly, alters the legal landscape created by *White Mountain Apache* and *Mescalero Apache*. The decision

below leaves substantial doubt concerning a State's ability to regulate or tax Indians off-reservation through nondiscriminatory laws (including tax laws). Further, States cannot now even be reasonably assured of their sovereign authority to regulate or tax non-Indians off-reservation through taxation. The Court of Appeals' decision dramatically departs from controlling authority from this Court, and sharply veers away from other circuits' decisions.

The Court of Appeals' decision significantly contracts the States' sovereign power to tax off-reservation transactions, constitutes a marked departure from the path-marking *Mescalero Apache Tribe*, and conflicts with First and Ninth Circuit holdings that the balance-of-interests test does not apply to off-reservation transactions. *Narragansett Indian Tribe v. Narragansett Elec. Co.,* 89 F.3d 908, 915 (1st Cir. 1996) (If the housing site is not Indian country, there is no bar to the exercise of the State's jurisdiction.); *Blunk v. Ariz. Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999) (federal preemption does not bar states from regulating the activities of non-Indians outside of Indian country); *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 & n.6 (9th Cir. 1994) (federal preemption prong of the Indian preemption doctrine applies to on-reservation conduct and general preemption standards apply to off-reservation activities).

The question whether balancing is required in considering State jurisdiction off-reservation was also considered by the New Mexico Supreme Court. The New Mexico Court noted that it was unable to discover any direction by this Court that preemption-by-implication, an exception to the general doctrine that preemption must be by an explicit act of Congress, applies to activities which occur off-reservation. It thus held that exemptions from State

tax by implication are permitted only where the taxed activity of the non-Indian occurred on-reservation. *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. State*, 107 N.M. 399, 402, 759 P.2d 186, 189 (1988). Citing controlling authority that privileges of tribal sovereignty do not extend beyond the political and geographical boundaries of a sovereign, the New Mexico court held that in reviewing State taxation of activities of non-Indians *off the reservation*, an actual conflict with an express federal provision is required. *Id.* at 402.

The appeal of the *Rodey* decision to this Court was dismissed by this Court for lack of a substantial federal question. 490 U.S. 1043 (1989). Thus, its holding is controlling authority here. *Hicks v. Miranda*, 422 U.S. 332 (1975).

In sum, the Tenth Circuit's decision creates a palpable conflict between the First and Ninth Circuits and the New Mexico Supreme Court for purposes of S. Ct. R. 10(a).

Finally, the pernicious effect of the Court of Appeals' reasoning on the States' administration of their tax laws must be emphasized. If the decision below is not reversed, before exercising tax jurisdiction with respect to an off-reservation transaction, States will have to ascertain whether the exercise of such jurisdiction might have an indirect economic effect on a tribe's proprietary interests. Such a judicially mandated inquiry is an affront to State sovereignty, *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *Dows v. Chicago,* 11 Wall. 108, 110 (1871). ("It is upon taxation that

the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")

The Court of Appeals' holding wrongly cuts a wide swath through significant, fundamental interests of State sovereignty that have been pivotal in our system of federalism for well over a century and a half.

The Court of Appeals' analysis and holding are wrong and insupportable. Indeed, the error is so manifest and creates such significant, adverse consequences for the States that reversal is warranted. This Court's decision in *Mescalero Apache Tribe* and *Colville* expressly rejected the reasoning upon which the Court of Appeals relied in this case, as well as its holding.

Finally, the Court of Appeals' decision erroneously exposes the States' system of taxation to unwarranted vulnerability as a practical matter. In any suit brought by a tribe involving off-reservation state taxation, tribes will presumably be able to bring all manner of claims alleging that state action off-reservation against Indians or non-Indians has an adverse economic effect on the tribe which, *inter alia*, "harms" the tribe, and thus preempts the state's sovereign, off-reservation authority to tax. This too is untenable under our system of federalism.

Thus, reversing the Court of Appeals' error in this case is not just a nicety of legal reasoning, but a practical necessity. Kansas respectfully requests that the Court reverse the Court of Appeals erroneous holding on this issue.

II. The Perpetual Uncertainty in Lines of Demarcation and Lack of Meaningful, Clear Guidance that is Absolutely Critical to States in the area of Taxation, Dictates That the *White Mountain Apache* Balancing Test Be Replaced in the Taxation Context with a Preemption Analysis Based on the Principle that Indian Immunities are Dependent Upon Congressional Intent.

In order to finance their governments, provide services, and properly administer programs for their citizens, States need clarity in jurisdictional limitations, certainty in rules of application and consistency of results. The balance-of-interests test is seriously deficient on all counts.

It has become abundantly clear that the *White Mountain Apache* interest-balancing test laid down almost 25 years ago is simply unworkable. Justice (now Chief Justice) Rehnquist's dissent in *Colville* was prescient in this regard. The judiciary has become log-jammed with protracted litigation in which neither side can, nor will, acknowledge that the balance of interests favors the other. This flight to litigation is encouraged by the balance-of-interests test itself, which has devolved into a case-by-case, highly subjective test whose results are plainly unpredictable. As previously noted, no circuit or state supreme court has used the balance-of-interests test to strike a lawful, nondiscriminatory State tax imposed off-reservation against non-Indians. In light of *Mescalero Apache*, which allows States to impose nondiscriminatory tax laws off-reservation even against Indians, the decision by the Court below to use the balance-of-interests test to strike a State tax imposed off-reservation against a non-Indian can

only be characterized as dramatically unpredictable as well as unprecedented.

More to the point, the fact that States must now ascertain whether their off-reservation taxation may have an economic effect on a tribe is plainly impracticable. For example, the test requires States to make determinations of whether an off-reservation transaction is taxable prior to the transaction even occurring on facts that a State cannot possibly know and whose potential effects are unknown. This simply exceeds the capability of any official or institution. The only way that a State will be able to "know" about transactions occurring off-reservation and the economic effects on tribes is when a tribe sues the State alleging harm. Thus, the real world result of the balance-of-interests test has become a nearly one hundred percent guarantee of protracted litigation. A test should be designed to mitigate conflict, not be the catalyst for litigation. This concern was rightly noted by Chief Justice Rhenquist in *Colville*, and has become all the more urgent today.

By way of example, a paradigm of the multi-layered complexity attendant to the *White Mountain Apache* analysis in a taxation context is *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on-reservation on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

In our case the following facts favor preemption:

1. The fee is held by the United States in trust for the Tribe.

2. The Tribe has furnished the site for the Hotel.

3. The Tribe has ownership of the Hotel, its facilities, and all improvements.

4. The Tribe has a residual interest in the assignment of the lease.

5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.

7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.

8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The manager of the Hotel was not aware of any employee from the Tribe.

2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.

3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.

4. The Tribe receives only a guaranteed 1-¼ percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."

5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

> (a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.
>
> (b) The law governing liens . . . and other security instruments such as the mortgages by which the Hotel is financed.
>
> (c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, similarly to the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's "'active role in *generating activities of value* on its reservation[;]'" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the

conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services "critical" to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting).

As can be seen from just this one case, the permutations of facts and circumstances in any given situation are legion, indeed, incalculable. Any variation of fact or circumstance, no matter how slight, could, in some court's mind, tip the "balance" in the opposite direction. It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and tax administrators with no real guidance in attempting to conform their actions with applicable federal common law.

States simply cannot administer their statutes effectively when one party can change circumstances or create novel theories that ostensibly "shift" the balance against the State tax. States need a clear, bright-line test. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995). Balancing simply does not provide it. The appropriate approach is instead to follow a straightforward standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax may ultimately be borne by the Government. *See Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37-38 (1999).

The standard imposed by the Court of Appeals upon States now is that because the United States has a generalized interest in tribal economic viability, State taxes, even those imposed off-reservation against non-Indians,

that may have an indirect economic effect on tribes, are void. Pet. App. 12-13. Such a categorical bar to State taxation has been rejected by this Court. *Colville*, 447 U.S. 134, 154-56 (1980).[1]

The Court of Appeals could only reach its conclusion by contorting the balance-of-interests test because there is no controlling authority to support the Court of Appeals' leap in logic. However, the balance-of-interests test provides no discernible limitation on lower courts to avoid such judicial legislation. And this is the peril, the Achilles

[1] Curiously, this Court has rejected the notion that a generalized federal interest in tribal economic development, an interest the Court of Appeals here found dispositive, as an overriding force preempting an otherwise valid State tax on non-Indian activity, even on-reservation. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154-56 (1980). ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.") *Colville's* precedent has been followed by the Ninth Circuit in *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995) ("The federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency. However, that interest does not, without more, defeat a State tax on non-Indians.") *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) ("The promotion of tribal economic development has long been recognized as an important federal interest. However, as noted by the State, the Supreme Court has rejected it as an overriding force preempting an otherwise valid State tax on non-Indians.")

heel, of the balance-of-interests test. It has evolved into a beauty is in the eye of the beholder test.

While, as developed in Part III below, the lower court's interest-balancing analysis cannot be squared with this Court's reasoning in, *inter alia, Colville,* the fact remains that the *White Mountain Apache* approach fosters such judicial free-wheeling. Taxation, however, perhaps more than any other area of the law, needs clarity and something more definitive than a subjective, randomly applied standard.

To appreciate the unmanageability of the Court of Appeals' use of the balance-of-interests test to strike the State tax here, all of the cases on which the Court of Appeals relied are simply inapplicable, or, at the very least, clearly distinguishable, from this case in fundamental respects.

The Court of Appeals, while ignoring the fundamental differences from the case at bar, relies on *Colville*; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); and, *Chickasaw Nation*, to support its conclusion that the balance-of-interests test operates to strike the State tax imposed off-reservation. However, each of those cases involve either (1) state regulation of activity occurring on tribal land; or (2) a requirement that tribes collect and remit taxes to the State from transactions arising on-reservation; or, (3) both.

In this case, by contrast, the only connection between the Kansas tax and the tribe is that some distributors sell motor fuel to the tribe and may charge a price that reflects the tax's economic burden. The State is not attempting to regulate any activity on tribal lands, is not attempting to exercise jurisdiction over the tribe or its members, and is

not even requiring the tribes to collect and remit taxes to the State.

In this case, the District Court correctly determined – and the Court of Appeals did not dispute – that the State's exercise of jurisdiction through the legal incidence of the Kansas tax at issue falls on non-Indian distributors on transactions occurring off-reservation, rather than on the tribe. Pet. App. 45. Indeed, no other conclusion seems possible here, given that the tax is not imposed on any activity occurring on tribal lands and the tribe is not required to collect or remit the tax to the State.[2]

Not able to find controlling authority that strikes State jurisdiction imposed against non-tribal members off-reservation, the Court of Appeals, using the balance-of-interests test as its justification, instead rested its decision on the notion that the transient economic burden of an off-reservation State tax harmed the tribe's economic viability (*i.e.* its profits); and that, in and of itself, was sufficient to preempt the State tax.

The Court of Appeals conclusion was created out of whole cloth via the balance-of-interests test. It is the only way that the State tax could be preempted, because there was no controlling authority to support any other method of preemption.

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[2] Whether the legal incidence of tax as a "frequently dispositive question" as determined by this Court in *Chickasaw Nation* retains its vitality is presented by the petition for writ of certiorari in *Hammond v. Couer d'Alene Tribe*, No. 04-___, with respect to the judgment in *Coeur d'Alene Tribe v. Hammond*, ___ F. 3d ___ 2004 WL 1852897 (9th Cir. 2004) filed simultaneously with this writ.

The Court of Appeals' holding in this case as stressed above, clears the way for a host of tribal challenges to State taxes (or any State regulation) that are not imposed on tribes but that may indirectly affect tribes and non-Indians who do business with tribes. For example, an increase in gasoline distributors' State property, sales or income taxes generally result in an increase in the price that distributors charge their customers for gasoline. Because the tribal retailers may pay higher prices for their gasoline as a result, the Court of Appeals' reasoning allows tribes to challenge any State tax that their supplier has to remit to the State, the legal incidence of which clearly falls upon distributors. The chaos that will result from following the Court of Appeals' reasoning has already occurred in Kansas.

For example, based on the Court of Appeals' decision in *Sac and Fox v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001), distributors in Kansas are required to remit fuel taxes on fuel delivered to tribal gas stations owned by three (3) other Kansas tribes, even though those gas stations also sit near other tribally owned businesses. *Id.* at 583. Now, however, the same Court of Appeals has said that because this gas station sits near a tribally owned business, notions of tribal immunity can reach across reservation boundaries and strike the same precise tax imposed off-reservation on the same precise distributor.

The Court of Appeals' approach opens the door for tribes to continue to manipulate facts or create novel theories and re-litigate until they hit upon the right combination that, in the Court of Appeals' eyes, merits striking the off-reservation State tax in question. Common

sense, if not judicial reasoning, cries out that the balance-of-interests test needs to be abandoned.

Indeed, the District Court, following controlling precedent from this Court and the Tenth Circuit and looking at the same precise facts came to a conclusion that is 180 degrees from the Court of Appeals' decision. A test that yields such widely disparate results within the same circuit provides no guidance whatsoever to States in their on-going efforts to plan governmental functions and administer their laws.

The balance-of-interests test itself has predestined this outcome. The test itself has created uncertainty and confusion in the lower courts resulting in conflicting decisions emanating from facts that at their core are not so vastly different. This is not the purpose of a rule that is supposed to bring clarity and applicability to future, analogous cases. Tax administration requires predictability. *Chickasaw Nation*, 515 U.S. at 459-60. While there are many words that could be used to describe the balance-of-interests test, predictability is not one of them.

Kansas asks this Court to abandon the balance-of-interests test in favor of a straight, federal preemption standard based on congressional intent similar to the standard recognized in *United States v. New Mexico*. Such an approach provides clear guidance, clear lines of demarcation and clear, readily applicable results. There is, in this regard, no substantial justification for imposing a less stringent preemption standard with respect to Indian tribes or their members than for the Federal Government. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 847 (1982) (Rehnquist, J., dissenting) (criticizing application of *White Mountain Apache* where holding

"accord[ed] a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here").

Adoption of a federal preemption based on congressional intent such as expressed in *New Mexico* will recognize the States' compelling interest in a predictable sphere of taxing authority and the inappropriateness of rebalancing that interest from case to case. This approach, lastly, comports in rationale and result with the "categorical" rule (*Chickasaw Nation*, 515 U.S. at 450) adopted by the Court against direct state taxation of tribes and their members with respect to reservation transactions absent congressional authorization. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.17 (1987) (because "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak[,] . . . it is unnecessary to rebalance these interests in every case").

III. In Sharp Contrast to Decisions from Other Circuits, and Contrary to Controlling Precedent from This Court, the Court of Appeals' Decision Wrongly Placed the Tribe's Economic Interest in a Position Superior to the State's Strong, Fundamental Interest in its System of Off-reservation Taxation.

The Court of Appeals misapplied the *White Mountain Apache* interest-balancing test by misconstruing the "value-generated-on-reservation" element discussed in *Colville*. The Court of Appeals reasoned that because the tribe's gas station sits near the tribe's casino, and because casino patrons are drawn to the gas station by the casino,

then such proximity creates "value generated on the reservation" sufficient to trump the state tax imposed on off-reservation transactions.

Colville, however, actually stated that "[w]hile the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-57. In contrast, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 157.

It is clear from a plain reading of *Colville* that the discussion of the "value generated" topic by the *Colville* Court was only addressing the limited question of the State and tribe taxing the same taxpayer, on the same transaction, on-reservation.

Unlike the situation in *Colville*, the Kansas tax in this case is paid not by the ultimate consumer – *i.e.*, the gas station patron – but the distributor that not only conducts its business off-reservation generally but also is taxed upon the *receipt* of fuel – a transaction that takes place off-reservation. In contrast, the tribe's fuel tax here is imposed on the ultimate consumer on the reservation.

In this case, we have two different taxes imposed at two different points in time on two different transactions on two different sets of taxpayers on two different values. By contrast, the Court of Appeals' rationale improperly expands *Colville*, which only addressed a situation in which both the State and tribe were taxing the same

taxpayer on the reservation on the same value. The basis of the *Colville* decision is not present in the facts and circumstances of this case. By expanding *Colville* beyond its express, limited application, the Court of Appeals has wrongly misapplied the analysis and holding of *Colville*.

Moreover, the Court of Appeals ignored the fact that the State taxpayer, the distributor here, and the tribe's patrons are afforded many State benefits, chief of which is four-lane State Highway 75 to get to the tribe's gas station.[3] That State highway is paid for with State fuel taxes. Kan. Stat. Ann. § 79-3402 (Supp. 2003). *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 336 (1983). ("[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention"). The significance of this reality was noted by the District Court, Pet. App. 48, but appears to have been lost on the Court of Appeals.

Rather, the Court of Appeals placed entirely too much weight on the one and a half mile access road built by the tribe from State Highway 75 to the tribe's gas station and the claim that the tribe's gas station would have few customers if not for the casino. Indeed, the Court of Appeals' decision leads one to the conclusion that all of these gas station patrons simply spend their time driving up and down that mile and a half access road. The Court of Appeals overlooked a prior panel's decision that customers of tribally operated gas stations largely use State highways and services paid for by State fuel taxes. *Sac and Fox Nation v. Pierce*, 213 F. 3d 566, 585 and n.15 (10th Cir. 2000).

[3] While it is the largest roadway on and near the tribe's reservation, State highway 75 is only one of many State and local roads paid for by State motor fuel taxes on and near the tribe's reservation that patrons use to get to the tribe's casino.

Ironically, the tribe's access road (and its gas station and its casino) would have no value whatsoever if the State had not built and maintained State Highway 75 that the tribal access road abuts with the very fuel taxes that have now been preempted. How many casino patrons would be "drawn" to the tribe's gas station or casino if they had to walk to the access road instead of using a modern, four lane, state-of-the-art State built and maintained highway? While this was a key factor for the District Court and the prior Circuit panel in *Sac and Fox Nation*, the Court of Appeals' decision here is strangely silent.

These critical distinctions aside, the Court of Appeals improperly viewed *Colville* as authorizing invalidation of a state tax merely because, in its view, the purchasers were drawn to the gas station because of a nearby tribally operated business.

Colville, and later cases including, most importantly, *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989), clearly stand for the proposition that a State may tax a nonmember doing business with a tribe when it provides governmental services benefiting the taxpayer, and here Kansas built and maintained the road system that allowed the distributors and patrons to access the gas station – a road system paid for by the State fuel tax.

Taxation is a core sovereign interest of the States. The real effect of the Court of Appeals' decision here is to preclude the collection of a validly enacted State tax, a tax which is not even imposed on the tribes and does not require their assistance in collecting, thereby depriving the State of substantial tax revenue that it would otherwise

collect. Our system of federalism simply does not support such a conclusion.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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United States Court of Appeals
Tenth Circuit.

AUG 11 2004

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION,

Plaintiff-Appellant,

v. No. 03-3218

STEPHEN S. RICHARDS, Secretary
of the Kansas Department of Revenue,

Defendant-Appellee,

WINNEBAGO TRIBE OF NEBRASKA,
HCI DISTRIBUTION, THE KICKAPOO
TRIBE OF INDIANS OF THE KICKAPOO
RESERVATION IN KANSAS, THE IOWA
TRIBE OF KANSAS AND NEBRASKA,
AND THE SAC AND FOX NATION
OF MISSOURI,

Amici Curiae.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 99-CV-4071-JAR)

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Before LUCERO, McKAY, and HARTZ, Circuit Judges.

McKAY, Circuit Judge.

This case addresses whether federal law prohibits Kansas from collecting its state tax on fuel supplied to an Indian tribe by a non-Indian distributor. Prairie Band Potawatomi Nation (the "Nation") sought to invalidate the fuel tax on grounds that it is preempted by federal law and that it infringes on the Nation's rights of self-government. The district court granted summary judgment for the Secretary of the Kansas Department of Revenue (the "Secretary"), and the Nation brought this appeal.

Facts

The following facts are undisputed. The Nation is a federally-recognized Indian tribe whose reservation is on United States trust land in Jackson County, Kansas. Aplt. App., Vol. I, at 35. On its reservation, the Nation financed, constructed, and now owns and operates a $35 million casino. *Id.*, Vol. II, at 70. By building this casino, the Nation increased the number of people who travel to this otherwise remote and rural area. *Id.* at 70-71. To accommodate casino patrons and other reservation-related traffic, the Nation financed and built a gas station (the "Nation Station") which is close to the casino and on the same federal trust land. In building the Station, the Nation incurred $1.5 million in construction costs, which included the purchase of a motor fuel handling system with tank storage and monitoring systems to make fuel available to customers. *Id.*, Vol. III, at 22. The Nation Station is tribally-owned and operated, and, as of May 2000, eleven of its fifteen employees were Indians, with seven of those being Nation tribal members. *Id.* at 2-3. The Nation submitted expert testimony, which the Secretary does not dispute, that "the 'value marketed' by [the] Nation Station results from the business generated by the casino and from employees of the casino and [the Nation's] government and residents." *Id.*, Vol. II, at 86. This conclusion is supported by the undisputed evidence that seventy-three percent of the Nation Station's fuel customers are casino patrons and casino employees and another eleven percent live or work elsewhere on the reservation. *Id.*; *Id.*, Vol. V, at 46; Aple. Br. at 5. The Nation's expert also reported that the Station is a location-dependent business because, "[b]ut for the casino, there would not be enough traffic to support [it] in its current location." Aplt. App., Vol. II, at 86. The Nation Station sells fuel at fair market

prices. Therefore, it cannot and does not advertise an exemption from state fuel taxes. The Nation's expert concluded that "the Nation is not 'marketing a tax exemption' because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market." *Id.* at 84. The Nation also submitted two affidavits – one from the Station's manager and one from the Nation's Treasurer and Tax Commissioner – that support this conclusion. *Id.* at 71; *Id.*, Vol. III, at 161. The Secretary has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices.

The Nation imposes a tax on the Station's fuel sales: 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). Aplt. App., Vol. IV, at 207; Vol. V, at 169. The Station provides the Nation with its sole source of fuel revenue, which amounts to about $300,000 in tribal fuel taxes each year. Aplt. App., Vol. III, at 3. Pursuant to the Nation's Motor Fuel Tax law, this fuel revenue is used for "constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation." *Id.*, Vol. IV, at 208. This includes maintenance on the road that connects the United States Highway 75 to the Nation's casino. The Nation receives no financial assistance from Kansas to maintain this stretch of roadway.

Discussion

In this dispute, the Nation challenges the 1995 amendment to the Kansas Motor Fuel Tax Act. Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997). Pursuant to this

amendment, the Kansas Department of Revenue began collecting, for the first time, a tax on motor fuel distributed to Indian lands. The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors. Kan. Stat. Ann. § 79-3408(c); *Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000). But, the distributors are allowed to pass the tax directly to retailers, like the Nation Station. Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as part of the selling price.") The Nation brought suit to enjoin the Secretary from imposing the tax on the Nation's fuel, and the district court granted summary judgment for the Secretary. We review a district court's grant of summary judgment *de novo* to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1175 (10th Cir. 2001); *Sac and Fox,* 213 F.3d at 583.

The Nation asks us to invalidate the tax as it applies to the Nation's fuel under two independent but related doctrines. First, the Nation argues that federal law preempts the tax because federal and tribal interests against state taxation outweigh Kansas' interests in imposing the tax. Second, the Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government. Either of these doctrines would be sufficient to invalidate the Kansas fuel tax as applied here. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

We first address whether the tax is preempted by federal law. The constitutional source of federal preemption is Article I, Section 8, Clause 3, which provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." When preemption analysis is applied to Indian cases, we consider the unique origins of tribal sovereignty and how it differs from state sovereignty. *Bracker,* 448 U.S. at 143. Specifically, "[a]mbiguities in federal law have been construed generously in order to comport with [the] traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143-44 (citing *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174-75, and n.13 (1973)). "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertions of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).

In cases like this – where a tribe is challenging a state tax – "[t]he initial and frequently dispositive question . . . is who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy. . . ." *Id.*

Although the Secretary argues that the balancing of interests test should be abandoned, citing Justice (now Chief Justice) Rehnquist's partial dissent in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 176-80 (1980), circuit precedent requires us to use this balancing test. *See Sac and Fox,* 213 F.3d at 583. The balancing test is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker,* 448 U.S. at 145.

Applying these principles, we conclude that the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax. The Nation's interests are particularly strong. Tribes have a recognized "interest in raising revenues for essential governmental programs, [and] that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville,* 447 U.S. at 156-57.

Here, the Nation's fuel revenues are derived from value generated primarily on its reservation. In determining reservation value, the unique facts of this case require us to look beyond the physical fuel (the Nation receives its fuel in "ready to sell" condition) and to view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219-20 (1987) (balancing tribal and state interests by examining the bingo enterprise as including the facilities and ancillary

services offered to patrons); *Bracker,* 448 U.S. at 145-51 (weighing the tribe's general economic interest in its timber industry to invalidate a state motor carrier license tax and a use fuel tax applied to non-Indians doing business with the tribe); *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n,* 829 F.2d 967, 986 (10th Cir. 1987) (weighing the tribe's interest in its bingo enterprise as a "form of entertainment"); *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1410 (9th Cir. 1992) (weighing the state interests in taxing tickets to on-reservation events and concessionary items against the tribes' "involvement in the production of the entertainment events which take place on its reservation").

The close nexus between the Nation's fuel sales and its gaming enterprise is critical to our analysis here. When we recently reviewed the Kansas fuel tax as it applied to a tribe's retail station alone, we held that "the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value 'generated on the reservations by activities in which the Tribes have a significant interest.'" *Sac and Fox,* 213 F.3d at 585 (quoting *Colville,* 447 U.S. at 155) (remanding to develop an adequate record to balance tribal and state interests). There, we also held that we would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians, particularly where the tribes' "fuel market exists only because of the Tribes' claimed exemption from the [state] fuel tax." *Id.* Here, in contrast, the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides. Also, unlike in *Sac and Fox,* the Nation's fuel market does not exist because of a

claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities. This is clear from both the undisputed expert testimony that the Station's fuel market only exists because of the Nation's casino and from the undisputed fact that seventy-three percent of the Station's fuel patrons are casino patrons and employees. For these reasons, we balance the competing interests by viewing the Nation's fuel revenues as being derived primarily from value generated on its reservation.

In balancing the interests, both the district court and the Secretary heavily relied on *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), to conclude that Kansas' interests in taxation outweigh the competing federal and tribal interests. Aplt. App., Vol. V, at 64-65; Aple. Br. at 30-31. In *Colville,* the Court upheld state taxes applied to on-reservation retail sales of cigarettes and tobacco products because "[w]hat the smokeshops offer . . . is solely an exemption from state taxation." *Id.* at 155. "It is painfully apparent," the Court said, "that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* The Court then validated the state tax, holding that "[w]e do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

We distinguish *Colville* in two critical ways. First, in stark contrast to the smokeshops in *Colville,* the Nation is not marketing an exemption from state taxes. The undisputed

evidence is that the Nation sells its fuel at fair market prices. Aplt. App., Vol. II, at 71, 84; Vol. III, at 161. Thus, a central component to the reasoning of *Colville* is inapplicable here.

Second, unlike in *Colville,* the Nation is not merely importing a product for resale to non-Indians; rather, the revenues from the Nation's fuel to non-Indian consumers are derived from value "generated on the reservation [] by activities in which [the Nation has] a significant interest." *Colville,* 447 U.S. at 155. It is undisputed that when the Nation financed and built its $35 million casino to attract non-Indian patrons, it created a new fuel market for an otherwise remote area. After creating this new market, the Nation financed and built the Station to offer fuel to its casino patrons and other reservation-related traffic.

The Supreme Court has acknowledged this second distinction when it distinguished *Colville* where tribes "are not merely importing a product onto the reservations for immediate resale to non-Indians" but have created an entertainment enterprise designed to attract non-Indian consumers onto its reservation. *Cabazon,* 480 U.S. at 219. In *Cabazon,* the Supreme Court held that the federal and tribal interests outweighed state interests in regulating bingo and other games because, unlike in *Colville,* the tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. *Id.* As in *Cabazon,* the Nation built a modern casino and ancillary services, like

the Nation Station, in order to offer its patrons an attractive entertainment opportunity. Here, seventy-three percent of the Nation Station's fuel customers are casino patrons and employees. Aplt. App., Vol. II, at 86. These patrons, like those in *Cabazon,* spend extended amounts of time using the entertainment services offered by the Nation. Thus, the Nation's fuel revenues are derived from activities – that is, drawing non-Indians to its gaming enterprise – in which the Nation has a significant interest.

The Nation's interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance. It is undisputed that the Nation's only source of fuel revenue comes from the Nation Station. *Id.,* Vol. III, at 3. Fuel revenue is typically used to pay for a government's infrastructure expenses, and, in this case, the Nation's Motor Fuel Tax law specifically requires that all fuel revenue (approximately $300,000 per year) be used for "constructing and maintaining roads, bridges and rights-of-way located on or near the reservation." *Id.,* Vol. IV, at 208. The Nation has the financial responsibility for the majority of the roads and bridges on and near its reservation. *Id.,* Vol. III, at 22-23. Of particular importance here, the Nation has an ongoing and future responsibility to maintain the stretch of roadway that connects the United States 75 Highway (the main highway leading to the reservation) with the casino. *Id.* at 23. "The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1 1/2 miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection." *Id.* Thus, the Nation used its fuel revenues to provide better access from the main federal highway to its

casino. Kansas does not contribute funds to cover the costs of maintaining this access road.

The Secretary argues that the Nation could continue collecting fuel revenues from the Nation Station by imposing its tax in addition to the state tax. But the Nation's expert explained that this is not economically feasible. He reported that [b]asic economic theory teaches that the [Nation Station] cannot charge prices high enough to allow collection of both the Kansas and [the Nation's] fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero. Aplt. App., Vol. II, at 89. The Secretary has not submitted contradictory evidence and has not argued that this opinion is either incorrect or exaggerated. The "economic realities of the situation [] both in the presence and absence of the motor fuel tax" are relevant in balancing the competing interests. *Sac and Fox,* 213 F.3d at 585; *see also Colville,* 447 U.S. at 157-58 (noting that a tribe bears the burden of showing that its smokeshop businesses would be significantly reduced absent a credit for tribal taxes paid). This economic reality adds to the Nation's already strong interests against taxation.

The Nation's interests in this case are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments. These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001); Indian Self-Determination

and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed. Reg. 57641 (Nov. 15, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Presidential Executive Order 13175, 65 Fed. Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ("[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."); *Bracker,* 448 U.S. at 143-44 (noting "a firm federal policy of promoting tribal self-sufficiency and economic development" as evidenced by various congressional enactments); *Colville,* 447 U.S. at 155 (recognizing "varying degrees [of] congressional concern with fostering tribal self-government and economic development").

Against these strong tribal and federal interests, the sole interest Kansas asserts is its general interest in raising revenues. Of course, states have a "legitimate governmental interest in raising revenues, and that interest is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville,* 447 U.S. at 157. Here, Kansas' interest is not at its strongest. The tax is directed at fuel which, under the particular circumstances of this case, is derived primarily from value generated on the reservation. Also, Kansas does not provide any financial assistance in maintaining the access roadway from the United States 75 Highway to the casino. The ongoing and future obligation to upkeep this stretch of roadway is exclusively the Nation's, and the Nation's only source of fuel revenue (which is designated for this obligation) comes from the Station.

Under these facts, Kansas' generalized interest in raising revenues is insufficient to justify its tax.

Therefore, we invalidate the Kansas Motor Fuel Tax as it applies to the Nation's fuel because the balance of tribal, federal, and state interests prohibits state taxation as a matter of law. Although Kansas has a legitimate interest in raising revenue, this general interest is insufficient to justify the tax under these particular facts because it interferes with and is incompatible with strong tribal and federal interests against taxation.

REVERSED.

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen S. RICHARDS, Secretary of the
Kansas Department of Revenue, State of Kansas,
in his official capacity, Defendant.
No. 99-4071-JAR.
July 2, 2003.

Indian tribe moved for reconsideration of decision, 241 F.Supp.2d 1295, which denied its action for relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. The District Court, Robinson, J., held that (1) district court did not rely on allegedly objectionable evidence in making its ruling, and (2) request that court rule that tribe had a constitutional and self-government right to impose tribal taxes with respect to motor fuel sold on reservation, did not warrant reconsideration.

Motion denied.

ROBINSON, J.

This matter is before the Court on Plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) brought pursuant to Fed.R.Civ.P. 59(e). Plaintiff asks this Court to reconsider and alter its order granting defendant's motion for summary judgment (Doc. 73).

I. BACKGROUND

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose

reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales via a tribally imposed tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel.

In addition to the tribal fuel tax, the Kansas Department of Revenue collects motor fuel tax on fuel distributed to the Nation Station pursuant to the Kansas Motor Fuel Tax Act.[2] The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe

[1] 25 U.S.C. § 2701 *et seq.*

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

claimed that the Indian Commerce Clause,[4] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[5] or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by this Court on January 15, 2003.[6]

In granting defendant's motion for summary judgment, the Court found that neither the doctrine of federal preemption or the doctrine of tribal rights to self-government prevented the state from imposing taxation on the fuel sold at the Nation Station. The Court further found that the Kansas Act for Admission did not prevent the state from imposing its own tax on fuel sold at the Nation Station. Plaintiff now asks the Court to reconsider its judgment. For the reasons discussed below, plaintiff's request is denied.

II. STANDARD OF REVIEW

A court may reconsider and alter a prior judgment if it is necessary to correct manifest errors of law or fact or to accept newly discovered evidence.[7] However, this does not include a review of arguments or evidence that could and should have been presented through the summary judgment

[4] U.S. CONST. art. I, § 8 cl. 3.

[5] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[6] *See Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[7] *Buell v. Security General Life Ins. Co.*, 784 F.Supp. 1533, 1536 (D.Colo.1992), *aff'd* 987 F.2d 1467 (10th Cir.1993).

process.[8] Likewise, it is inappropriate to re-visit issues that have already been addressed.[9] There is no entitlement to a second chance when a party has failed to present its strongest case in the first instance.[10] Three grounds for reconsideration are generally recognized: (1) an intervening change in controlling law, (2) availability of newly discovered evidence, and (3) a need to correct clear error or prevent manifest injustice.[11] Deciding whether to grant or deny a motion to alter or amend a judgment is within the court's discretion.[12]

III. DISCUSSION

Plaintiff's motion to reconsider first asserts that the Court erred in granting defendant's motion for summary judgment because the Court relied on defense exhibits that plaintiff had objected to in "Plaintiff's Objections to Defendant's Witness and Exhibit List" (Doc. 54). While plaintiff's objections to defendant's witness and exhibit list sought to preclude defendant from using objectionable evidence at trial, plaintiff's response to defendant's motion for summary judgment incorporated some of the objections as they related to those exhibits supporting defendant's

[8] *Steele v. Young*, 11 F.3d 1518, 1520 n. 1 (10th Cir.1993); *Wolfgang v. Mid-American Motorsports, Inc.*, 914 F.Supp. 434, 438 (D.Kan.1996); *Buell*, 784 F.Supp. at 1536.

[9] *Comeau v. Rapp*, 810 F.Supp. 1172, 1175 (D.Kan.1992).

[10] *Anspach v. Tomkins Indus., Inc.*, 817 F.Supp. 1499, 1518 (D.Kan.1993), *aff'd* 51 F.3d 285 (10th Cir.1995) (Table).

[11] *See e.g., Eichenwald v. Krigel's, Inc.*, 908 F.Supp. 1531, 1564-65 (D.Kan.1995).

[12] *Bancamerica Comm. Corp. v. Trinity Indus., Inc.*, No. 90-2325-GTV, 1995 WL 646790, at *1 (D.Kan. Oct.19, 1995) (citing *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir.1988)).

motion for summary judgment. On page seven of its response to defendant's motion for summary judgment, plaintiff asserts, "The Nation objects to Defendant's Exhibits 2-6 for all of the reasons stated in Plaintiff's Objections to Defendant's Witness and Exhibit List filed herein on October 30, 2000."

The exhibits that plaintiff objected to contain information regarding the services provided to the reservation such as education, fire and police support. Plaintiff now seeks a Court order sustaining its objections to defendant's witness and exhibit list and in turn, plaintiff asks the Court to reconsider its ruling on defendant's motion for summary judgment. The Court declines plaintiff's proposition to rule on its objections to defendant's witness and exhibit list because contrary to plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion.

Plaintiff contends that the Court relied on objectionable evidence because in Footnote 94 of the Court's order, the Court noted that, "the State also provides services on and near the reservation including maintenance of U.S. Highway 75 . . . fire and police protection." The Court first notes that plaintiff's response to defendant's motion for summary judgment does not dispute that these services exist. Instead, plaintiff simply disputes the extent to which the state services are more "significant, substantial or valuable" when considered in relation to tribal services.[13] Secondly, and more importantly, the Court's statement

[13] Plaintiff's Response to Defendant's Motion for Summary Judgment at 5 (Doc. 59).

regarding state services on and near the reservation was collateral to its actual holding.

In granting defendant's motion for summary judgment, the Court ruled that the state was not preempted from imposing its own fuel tax on fuel sold at the Nation Station. The Court determined that the evidence favoring the state's interest in imposing the motor fuel tax was so one-sided that the defendant was entitled to prevail as a matter of law. The Court's holding was largely premised on the fact that the state fuel tax was imposed on the sale of non-Indian products to non-Indian consumers.[14]

In reaching this conclusion, the Court noted that the legal incidence of the Kansas motor fuel tax undisputably falls on non-Indian distributors.[15] In addition, the Court rejected plaintiff's contention that fuel sold at the Nation Station was an Indian product because the tribe operates a casino in close proximity to the Nation Station. Finally, the Court noted that while the legal incidence of the tax falls on the distributors, the ultimate burden of the tax falls on consumers, the majority of which are non-Indian and are provided governmental services by the state off the reservation. The Court's statement regarding state services on and near the reservation was simply an attempt to reveal that the small number of fuel purchasers who live or work on the reservation receive some state services. Thus, the Court finds this is not an issue that

[14] *Prairie Band Potawatomi Nation v. Richards,* 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[15] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000) (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

requires this Court to correct clear error or prevent manifest injustice.

Plaintiff's second request in its motion for reconsideration is that the Court make a ruling finding that the plaintiff has a constitutional and federal self-government right to impose tribal taxes with respect to motor fuel sold on the reservation. It is clear from the Court's order granting summary judgment that such a ruling has already been made. In its order, the Court found that "[t]here is no question that the Tribe's power to tax transactions occurring on trust lands 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . .'"[16] The Court further found that despite plaintiff's right to tax transactions on reservation land, the tribe cannot "oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business."[17] Thus, the Court ruled in accordance with plaintiff's request, and there is nothing to reconsider.

Plaintiff's final request is that the Court reverse its judgment and enter judgment for plaintiff. The Court finds that plaintiff fails to proffer any grounds or argument justifying reconsideration. At best, plaintiff's motion merely rehashes arguments previously considered and rejected by the Court.[18] As such, the Court declines to

[16] *Prairie Band Potawatomi Nation,* 241 F.Supp.2d at 1311 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

[17] *Id.*

[18] *See Resolution Trust Corp. v. Greif,* 906 F.Supp. 1446, 1456-57 (D.Kan.1995) (noting a motion to reconsider is not a mechanism to raise

(Continued on following page)

revisit settled issues. In sum, plaintiff has not presented any instances of manifest error or mistake warranting reconsideration of the Court's prior ruling. Plaintiff's motion shall be denied.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) is denied.

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arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court).

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, Defendant.
No. 99-4071-JAR.
Jan. 15, 2003.

Indian tribe brought action for declaratory and injunctive relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. State moved for summary judgment. The District Court, Robinson, J., held that: (1) Court had jurisdiction to hear tribe's claim; (2) tribe had standing to bring action; (3) Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; (4) state was not barred by federal preemption from imposing tax; (5) tribe's interest in raising revenues did not outweigh state's interests; and (6) Kansas Act for Admission did not bar imposition of tax.

Motion granted.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Robinson, District Judge.

This action is before the Court on defendant's Motion for Summary Judgment (Doc. 49). Plaintiff has filed a Response (Doc. 59) and defendant has filed a Reply (Doc. 68). The Court has reviewed the parties' filings and is now prepared to rule.

I. FACTS

The following facts are taken from the record and are either stipulated, uncontroverted or viewed in the light most favorable to plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents. The Court also disregards conclusory statements.

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Once the fuel arrives on the reservation, the Nation Station unloads, stores, monitors and dispenses the fuel. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales.

The Tribe imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. The Nation Station is subject to $300,000 in tribal fuel taxes per year. The Tribe spends revenue from the fuel tax to construct and maintain roads, including the road leading from U.S. Highway

[1] 25 U.S.C. § 2701 *et seq.*

75 to the Tribe's casino and other roads on and near the reservation. The Tribe also provides government services including law enforcement, fire protection, emergency services, education services, urban planning, court services and other miscellaneous services. Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands. Then, in 1995, the Kansas legislature amended the Kansas Motor Fuel Tax Act[2] and the Department of Revenue began to impose fuel tax on fuel distributed to Indian tribes on tribal land. The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[4] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[5] A "genuine"

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

[4] Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993).

[5] *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

factual dispute requires more than a mere scintilla of evidence.[6]

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.[7] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[8] The nonmoving party may not rest on its pleadings but must set forth specific facts.[9]

"[The court] must view the record in a light most favorable to the parties opposing the motion for summary judgment."[10] Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative.[11] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[12]

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[6] *Id.* at 252, 106 S.Ct. 2505.

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir.1991).

[8] *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991).

[9] *Applied Genetics*, 912 F.2d at 1241.

[10] *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

[11] *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

[12] *Id.* at 251-52, 106 S.Ct. 2505.

III. DISCUSSION

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claims that the Indian Commerce Clause,[13] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[14] or other federal law prohibits imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. Defendant asserts that summary judgment should be granted because the State is entitled to Eleventh Amendment immunity,[15] the Tribe lacks standing, and the Hayden-Cartwright Act provides congressional consent for imposition of the State's fuel tax.[16] Defendant also asserts that there is no material issue of fact concerning whether the state fuel tax is preempted by federal law, whether the state fuel tax improperly infringes upon the Tribe's sovereign right to self-government, or whether the Kansas Act for Admissions bars imposition of the tax. The Court will take each of defendant's contentions in turn.

A. Jurisdiction and the Eleventh Amendment

The Tribe asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1362,[17] which grants

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[13] U.S. CONST. art. I, § 8 cl. 3.

[14] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[15] U.S. CONST. amend. XI.

[16] 4 U.S.C. § 104.

[17] The Tribe also claims jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331.

district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Defendant argues that despite the grant of jurisdiction in § 1362, the Eleventh Amendment bars the Tribe's claims. Defendant also asserts that *Ex parte Young*,[18] a legal fiction created to overcome the Eleventh Amendment's bar under certain circumstances, is inapplicable in this case. As discussed below, defendant's arguments are unfounded.

The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe.[19] In *Ex parte Young,* the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers, sued in their official capacity, to enjoin an alleged ongoing violation of federal law.[20] Defendant contends that the *Ex Parte Young* exception is inapplicable in this case because the relief being sought by the Tribe implicates special sovereignty interests.

[18] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[19] *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

[20] *Ex parte Young,* 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young*).

Defendant points to the Supreme Court case *Idaho v. Coeur d'Alene Tribe of Idaho,*[21] wherein the Court ruled that the *Ex parte Young* exception could not be entertained when the relief requested would be as much of an intrusion on state sovereignty as an award of money damages. In *Coeur d'Alene,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment to submerged lands located within the boundaries of the Coeur d'Alene Reservation.[22] The tribe also sought injunctive relief against various state officials to prevent them from exercising regulatory jurisdiction over the submerged land. The Court determined that the tribe's claims were the functional equivalent to a quiet title action and if relief was granted, it would have divested the state of substantially all regulatory power over the land at issue.[23] Thus, the Court found that the requested relief would affect Idaho's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," defeating plaintiff's *Ex parte Young* action.[24]

Soon after the Supreme Court's *Coeur d'Alene* decision, the Tenth Circuit decided *ANR Pipeline Co. v. Lafaver,*[25] where it held that the states' power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests, defeating an *Ex parte Young* action. In so holding, the Tenth Circuit interpreted *Coeur d'Alene* as requiring a new two-step analysis for determining whether *Ex parte Young* applies

[21] 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[22] *Id.* at 264-65, 117 S.Ct. 2028.

[23] *Id.* at 265, 117 S.Ct. 2028.

[24] *Id.* at 287, 117 S.Ct. 2028.

[25] 150 F.3d 1178, 1193 (10th Cir.1998).

in any given case. According to *ANR Pipeline,* federal courts are to first "examine whether the relief being sought against a state official implicates special sovereignty interests."[26] If the answer to the first inquiry is affirmative, the court "must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment."[27]

Relying on *Coeur d'Alene* and the *ANR Pipeline,* defendant asserts that an *Ex parte Young* action does not apply in this case because the relief sought by the Tribe implicates special sovereignty interests in the State's system of taxation and the requested relief would be the functional equivalent to money damages against the State. The Court finds defendant's reliance on these cases is misplaced. To rule otherwise would be to ignore the long line of cases decided in federal court relating to state taxation on tribal affairs.[28] As the Ninth Circuit pointed out in *Agua Caliente Band of Cahuilla Indians v. Hardin,*[29] "in the context of state taxation of *tribes,* there are preemption considerations and *competing* sovereignty interest, the merits of which are governed by a long line of cases." The issues presented by state taxation of tribal

[26] *Id.* at 1190 (citations and quotations omitted).

[27] *Id.*

[28] *See e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Moe v. Confederated Salish and Kootenai,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[29] 223 F.3d 1041, 1048 (2000).

interests were not present in either *ANR Pipeline* or *Coeur d'Alene,* both of which have been limited to their particular facts.[30] Thus, the Court finds that an *Ex parte Young* action is appropriate under the circumstances of this case.

In the alternative, the Tenth Circuit has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. § 1362, may seek injunctive relief from state taxation in federal court.[31] In *Sac and Fox,* the Tenth Circuit contemplated, under a set of facts very similar to those at hand, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Kootenai Tribes,*[32] the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, barred the tribes' suit.[33] The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida v.*

[30] *Robinson v. Kansas,* 117 F.Supp.2d 1124, 1136-37 (D.Kan.2000) (noting that Tenth Circuit has made it clear that finding a special sovereignty interest such as those found in *ANR Pipeline* and *Coeur d'Alene* is the exception not the rule) (citing *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir.1998); *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th Cir.1998); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998); *Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir.1998); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999).

[31] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 571-73 (10th Cir.2000). *See also Sac and Fox Nation of Missouri,* 979 F.Supp. 1350, 1352-53 (D.Kan.1997).

[32] 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding an Indian tribe's right to seek injunctive relief from state taxation in federal court).

[33] *Sac and Fox,* 213 F.3d at 572.

Florida,[34] finding that the *Seminole Tribe* Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from state taxation.[35] Based on the *Moe* decision, the Tenth Circuit reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of the Kansas fuel tax case.[36] Like the Tenth Circuit, this Court asserts jurisdiction under § 1362 and finds the Eleventh Amendment does not bar this suit.

As instructed by the Tenth Circuit in *Sac and Fox*, this Court has jurisdiction and the Eleventh Amendment does not bar the Tribe's claim brought pursuant to § 1362. Further, based on the legal fiction created in *Ex parte Young*, the Court finds that it has jurisdiction to hear this dispute. Therefore, summary judgment is not appropriate based on the State's Eleventh Amendment immunity.

B. Standing

Under Article III, § 2 United States Constitution, Federal courts have jurisdiction to hear a matter only if an actual "case or controversy" exists.[37] In determining

[34] 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Article I of the United States Constitution, including the Indian Commerce Clause, does not provide sufficient authority for Congress to abrogate that State's Eleventh Amendment immunity).

[35] *Sac and Fox*, 213 F.3d at 571 (citing *Blatchford*, 501 U.S. at 784, 111 S.Ct. 2578).

[36] *Sac and Fox*, 213 F.3d at 572.

[37] U.S. CONST. art. III, § 2.

whether a case or controversy exists, the Court must evaluate whether the Tribe has standing to sue.[38]

As stated by the Tenth Circuit in *Sac and Fox*, the Constitutional standing question addresses "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant its invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on its behalf."[39] To meet the standing requirement, the Tribe must allege "1) a concrete and particularized actual or imminent injury, 2) which is fairly traceable to the defendant's conduct, and 3) which a favorable court decision will redress."[40] In addition to the above mentioned requirements, the Supreme Court has enunciated several other prudential standing requirements. First, a plaintiff must assert its own rights and not those of others.[41] Next, a plaintiff will not meet the standing requirement if he or she asserts a "generalized grievance shared by a large class of citizens."[42] Finally, the interest which a plaintiff wants protected must be within the "zone of interests to be protected by the statute or Constitutional guarantee."[43]

[38] *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[39] *Sac and Fox*, 213 F.3d at 573 (citations and quotations omitted).

[40] *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)).

[41] *Id.* at 573 (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

[42] *Id.* (quoting *Warth*, 422 U.S. at 499, 95 S.Ct. 2197).

[43] *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)).

Defendant argues that the Tribe lacks standing to bring this case because the tax in question falls on the distributors, not the Tribe.[44] The Court finds that the Tenth Circuit's decision in *Sac and Fox* settles this issue.

Addressing the exact arguments made by defendant here, the *Sac and Fox* court held that a tribe has standing to sue a state in federal court where the tribe alleges particularized imminent economic injury due to the state's imposition of the fuel tax.[45] In *Sac and Fox,* the state alleged that the tribes did not have standing to bring suit challenging the Kansas motor fuel tax because the legal incidence of the tax falls on the distributors of the fuel rather than on the tribal retailers. The court rejected this argument stating that the court had "little difficulty concluding that the Tribes [have] constitutional standing to maintain their suit against the State."[46]

Like the tribes in *Sac and Fox,* the Tribe here meets the standing criteria to challenge the State's fuel tax.[47] First, the Tribe provides affidavits claiming injury including

[44] *See Sac and Fox,* 213 F.3d at 580 (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

[45] *Id.* at 573-74. The Court acknowledges that the case cited by defendant, *Carter v. Montana Dept. of Transp.,* 274 Mont. 39, 905 P.2d 1102 (1995), where the court held a fuel retailer did not have standing to challenge the state fuel tax when the legal incidence of the tax falls on the distributor, is somewhat in contrast to the Tenth Circuit's decision in *Sac and Fox.* Despite the value of the case to defendant's position, the Court finds it is bound by Tenth Circuit precedent, not by Montana Supreme Court precedent. Further, the *Carter* case can be distinguished because the gas station in question was not tribally owned and the case was not brought by the tribe, it was brought by an individual Indian.

[46] *Sac and Fox,* 213 F.3d at 573.

[47] *See id.* at 573-74.

interference with the right of self government and economic injury caused by the state fuel tax. Next, the alleged injury is directly traceable to the State's desire to impose a fuel tax,[48] in that the Act allows the tax to be passed on directly to the retailers.[49] Finally, deciding in favor of the Tribe will redress the alleged injury because if the distributors who distribute fuel to the Nation Station are not required to pay the tax, there will be no threat of passing the tax through to the Tribe.[50]

Further, like in *Sac and Fox,* the prudential standing principles discussed above do not bar the Court's exercise of jurisdiction.[51] First, the Tribe asserts its own rights to be free from the cost of motor fuel tax. The fact that the consumers and fuel distributors will unquestionably benefit if the Tribe is successful in challenging the tax, does not alter the Court's analysis.[52] Next, because the Tribe has asserted its right to be free from the fuel tax, it is not asserting a "generalized grievance" prohibiting the Court from exercising jurisdiction.[53] Finally, the Tribe's alleged economic interest in being free from taxation is arguably within the "zone of interest" that federal law seeks to protect.[54] In grappling with the "zone of interest" prudential requirement for standing, the Tenth Circuit noted that federal law has long sought to "protect tribal

[48] *Id.* at 574.

[49] *See* Kan. Stat. Ann. § 79-3409.

[50] *Sac and Fox,* 213 F.3d at 574 (citing Kan. Stat. Ann. § 79-3409).

[51] *See id.*

[52] *See id.*

[53] *Id.*

[54] *Id.*

self-government from state interference, including state taxation."[55]

Based on the above analysis, the Court finds that the Tribe has demonstrated that it has standing to bring this action in federal court. Therefore, summary judgment will not be granted on defendant's challenge to the Tribe's standing.

C. Hayden-Cartwright Act, 4 U.S.C. § 104

Defendant argues that pursuant to the Hayden-Cartwright Act, 4 U.S.C. § 104, Congress consented to the states' power to tax fuel distributions to Indian tribes, leaving the Tribe without recourse to challenge the tax. In pertinent part § 104(a) of the Act states:

> All tax levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military *or other reservations,* when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State

[55] *Id.* (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

> . . . within whose borders the reservation may be located.[56]

The State argues that the phrase "other reservations" includes Indian lands and that the term "licensed trader" specifically refers to tribal retailers. The Tribe counters that the Act is ambiguous and that ambiguity should be construed in favor of Indian sovereignty. Unfortunately, the Court is left with little guidance from the Circuit Courts or the Supreme Court in determining whether Congress intended the phrase "other reservations" to include Indian reservations.[57] Only the Idaho Supreme Court and the United States District Court for the District of Idaho have struggled with this difficult issue.[58] Although the Court is not bound by either of these decisions, the Court finds the decisions persuasive and holds that the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.

The Court begins its analysis by noting that a state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.[59] Because of the "unique trust relationship" between

[56] (Emphasis added).

[57] *Sac and Fox,* 213 at 576 ("Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands.")

[58] *Coeur D'Alene Tribe v. Hammond,* 224 F.Supp.2d 1264 (D.Idaho 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n,* 136 Idaho 53, 28 P.3d 996 (2001), *cert denied,* 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002).

[59] *See County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(Continued on following page)

the United States and Indian Nations, statutes that affect Indians are to be "construed broadly, with any ambiguous provision to be interpreted to their benefit."[60] Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians.[61]

Defendant argues that the language in the Hayden-Cartwright Act expressly approves state taxation of fuel delivered in Indian country. The Tribe argues that Congress did not expressly approve state taxation of motor fuel on Indian reservations and that the statute is, at best, ambiguous. Thus, the Tribe argues that the statute must be construed in favor of the Tribe and interpreted so as to not grant such taxing authority. Following the principles elucidated above, the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country. Defendant argues that the language in the Act, which allows for state taxation of motor fuels sold on

("['A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservations Indians.") (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory.")

[60] *Hammond*, 224 F.Supp.2d at 1268 (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *McClanahan*, 411 U.S. at 174, 93 S.Ct. 1257).

[61] *Hammond*, 224 F.Supp.2d at 1268.

"United States military or other reservations,"[62] includes Indian reservations. The Court is not persuaded by defendant's argument. As noted by United States District Court for the District of Idaho in *Hammond*, the term "reservation" has broad meaning and may or may not include Indian reservations.[63] The *Hammond* court explained that the term reservation has been used in land law to describe any body of land which Congress has reserved from sale.[64] The term has also been used to describe "military bases, national parks and monuments, wildlife refuges, and federal property."[65]

Additionally, as articulated by the Idaho Supreme Court in *Goodman Oil*, if Congress intended to include Indian lands in the pertinent part of the statute, § 104(a), it would have done so. The Act uses the phrase "Indian Lands or other federal reservations" in section three and the phrase "Indian reservation roads" in section six.[66] Congress's use of these distinct phrases convinces this Court that Congress could have specified that the entire Act was to apply to Indian reservations or Indian lands but did not. Therefore, by not using the word "Indian Reservation" in the applicable part of the Act, § 104(a), the language of the Act does not clearly show that Congress intended to allow state taxation of tribal fuel.[67]

[62] 4 U.S.C. § 104(a).

[63] *Hammond*, 224 F.Supp.2d at 1269.

[64] *Id.* (quoting *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

[65] *Id.*

[66] *See Goodman Oil*, 28 P.3d at 1000.

[67] *Id.*

Defendant also argues that the use of the term "licensed traders" equates to Indians or Indian traders, lending support for the position that Congress intended to allow states to tax in Indian country. The Court disagrees with defendant and finds that use of the term "licensed traders" is also ambiguous and therefore does not support defendant's position that the Act expressly grants states the authority to tax fuel on Indian reservations. As noted by the *Goodman Oil* court, at the time the Hayden-Cartwright Act was passed, the term licensed traders could have meant licensed sellers of malt beverages, licensed retailers on government reservations or licensed traders selling goods on all government reservations.[68] So, once again the term used by Congress is too broad to have the effect of conveying upon states the right to tax Indians. Congress could have used the term licensed Indian traders had it meant to grant states the authority to tax fuel on Indian reservations.

Defendant also urges the Court to resolve any ambiguities in the language of the Act by turning to the Act's legislative history and the executive interpretation of the Act. Defendant insists that the Court is required to defer to agency interpretation of a statute as required by the Supreme Court's decision in *Chevron U.S.A., Inc v. Natural Resources Defense Council.*[69] Defendant argues that the stated purpose of the statute, and two agencies' interpretations show, that the Act applies to Indian reservations.

[68] *Id.* (citing *Falls City Brewing Co. v. Reeves,* 40 F.Supp. 35 (D.Ky.1941)).

[69] 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Again, the Court disagrees. The Court will address defendant's arguments regarding the legislative history and agency interpretation in turn.

First, defendant draws the Court's attention to legislative history explaining the intended purpose of the Act. The purpose of the Act, which was passed in 1936, was to fund the extension of highway construction and maintenance. Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations. The legislative history discussing the purpose of the Act never specifically refers to Indian reservations.[70] Instead, the legislative history only discussed the inequities of selling gasoline free of state tax in "post exchange stores" and "government reservations." Once again, defendant contends that the use of the term government reservations was meant to include Indian reservations. As discussed above, the Court is not convinced that the use of the term "government reservations" includes Indian reservations. Further, as noted by the *Hammond* court, simply because Congress expressed its intent to give up the federal government's exemption from state motor fuel taxes, does not mean Congress was willing to sacrifice the Indians' exemption from the tax as well.[71]

Next, defendant calls the Court's attention to the opinions of the Attorney General and Solicitor of the

[70] *See* 80 CONG. REC. 8, 8701 (remarks of Congressman Whittington) ("In post exchange stores and on government reservations, gasoline and motor fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States. . . .").

[71] *Hammond,* 224 F.Supp.2d at 1269.

Department of Interior, alleging that the opinions clarify any ambiguity contained in the language of the statute Four months after the Act was passed in 1936, the Attorney General stated that the Act applied to a "military reservation, or an Indian reservation. . . ."[72] Also, the Solicitor of the Department of the Interior concluded that the Act authorizes state taxation of sales of motor fuel purchased on a reservation for tribal enterprise for resale both to non-Indians and members of the tribe.[73]

These statements suggest that the Attorney General and the Solicitor of the Department of Interior believed that the Act applied to Indian reservations, but as discussed in *Goodman Oil,* these statements are not sufficient to clarify the ambiguities contained in the Act.[74] The Attorney General Opinion of 1936 dealt with whether national parks fell within the Act and mentions "Indian Reservations" in passing.[75] The entire passage reads "some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations and that section does not expressly mention national parks."[76] The qualifier of "apparently" lends weight to this Court's conclusion that the Attorney General's interpretation is ambiguous.

The opinion of the Solicitor of the Department of the Interior is equally ambiguous. Referencing the Act, the

[72] 38 U.S. Op. Atty Gen. 522, 524 (1936).

[73] Application of Federal and State Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 138-40 (1940).

[74] *Goodman Oil,* 28 P.3d at 1000-01.

[75] *See id.*

[76] 38 U.S. Op. Atty Gen. 522, 524 (1936).

Solicitor said "[i]t is not clear, however, whether the Government agencies specified are intended to include such federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations."[77] While the Solicitor eventually concluded that the taxes could be levied in the circumstances before him, his statement shows that he also found the Act ambiguous.

Further, as noted in *Goodman Oil* and *Hammond,* Congress has recently attempted to pass legislation to authorize the state taxation of fuel sales on Indian reservations.[78] Such an attempt was apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations. If Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.

Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. The Court is further not persuaded by defendant's arguments relating to the legislative history or subsequent agency interpretation of the Act. Because Congress must be explicit if it intends to grant states the power to tax within Indian country, and because the Court finds Hayden-Cartwright does not provide for an explicit

[77] 57 Interior Dec. 129 at 138 (1940).

[78] *Hammond,* 224 F.Supp.2d at 1269 (citing H.R. No. 3966, 105th Cong.2d Sess. (1998); S. 550 106th Cong. (1999)); *Goodman,* 28 P.3d at 1001.

grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations, defendant's request for summary judgment on this issue is denied.

Because the Hayden-Cartwright Act is not a basis for summary judgment and because there is no jurisdictional bar preventing the Court from moving forward, the Court must now turn to the merits of the case.

D. Preemption and Tribal Self-Government

Two separate but distinct doctrines pose a barrier to the assertion of state taxation over transactions occurring on reservation land: federal preemption and tribal rights to self-government.[79] These doctrines manifest themselves from the broad authority given to Congress to regulate tribal affairs under the Indian Commerce Clause and from "the semi-independent" position of Indian tribes.[80] The Tribe asserts these doctrines bar the State from imposing its motor fuel tax on fuel delivered to the reservation. The Court is required to analyze the barriers posed by these doctrines independently because either doctrine, standing alone, can be a sufficient basis for holding that Kansas's motor fuel tax is invalid as it relates to fuel delivered to the Tribe's reservation.[81]

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[79] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[80] *Id.*

[81] *Id.*

1. Preemption

It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country.[82] If, however, the legal incidence of the tax rests on non-Indians, as it undisputably does here, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy."[83] Because the legal incidence of the Kansas motor fuel tax falls on non-Indians, the Court is required to determine if a material issue of fact exists as to whether the balance of the federal, state and tribal interests tilt in favor of the Tribe. The Court must grant defendant's motion for summary judgment if the Court finds the evidence favoring the State's interest in imposing the motor fuel tax is so one-sided that defendant is entitled to prevail as a matter of law.[84]

Ordinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in

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[82] *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians.' ").

[83] *Chickasaw Nation,* 515 U.S. at 459, 115 S.Ct. 2214.

[84] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

favor of the state.[85] In *Washington v. Confederated Tribes of the Colville Indian Reservation,* the Supreme Court held that while federal policy seeks to foster tribal self-government and economic development, it does not preclude state taxation of sales by Indians to nonmembers of the tribe.[86] In so holding, the Court announced that tribes cannot assert an exemption from state taxation by "imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises."[87] The Court reasoned that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts. . . ."[88]

The Tribe asserts that the rules set forth in *Colville* are inapplicable in this case because unlike the customers who were drawn to the smokeshops to avoid state cigarette tax in *Colville,* gas purchasers are drawn to the Nation Station because of its close proximity to the casino, a tribally owned and operated endeavor. The Ninth Circuit was presented with a similar argument in *Salt River Pima-Maricopa Indian Community v. Arizona.*[89] In that case, the tribe argued that the rules set forth in *Colville* only apply in cases where a tribe attempts to create a "magnet" effect of drawing customers on to the reservation by offering a lower sales tax rate than the state. The court cast serious doubt on the tribe's attempt to read *Colville* so

[85] *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 737 (9th Cir.1995).

[86] 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

[87] *Id.*

[88] *Id.*

[89] 50 F.3d 734.

narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent. According to the *Salt River* court, the most important factors in determining that the state tax was not preempted by federal law was that the goods and services sold were non-Indian, the legal incidence of the tax falls on non-Indians and the state provided most of the governmental services to those who bear the ultimate economic burden of the state tax.[90] Likewise, in the case before the court, the legal incidence of the tax falls on non-Indians, the Tribe is importing a non-Indian product[91] and selling the product mostly to non-Indians and those who bear the ultimate economic burden of the fuel tax, the consumers, are provided governmental services by the state.[92]

While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are

[90] *Id.* at 737.

[91] The court rejects the implication that fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include the proper facilities for unloading, storage, and dispensing of gasoline. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 800 F.2d 1446 (9th Cir.1986) (rejecting the tribe's assertion that *Colville* is inapposite where the tribe markets cigarettes as part of a legitimate business enterprise, where residents and visitors take advantage of other amenities offered by the tribe).

[92] *See Sac and Fox,* 213 F.3d at 584 (stating that the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer"). As discussed below in section D.2., the court rejects the Tribe's argument that it bears the ultimate economic burden of the fuel tax.

imported from off-reservation for sale to non-Indians.[93] The State's interest in raising revenues is strongest when, as here, non-Indians are taxed, and those taxes are used to provide the taxpayer with government services.[94] Based on the foregoing analysis, it is clear that the preemption balance unmistakably tips in favor of the State. Thus, summary judgment shall be granted as to the Tribe's claim arising under federal preemption.

2. Tribal Self-Government

The Tribe also asserts that imposition of the state fuel tax infringes on the Tribe's sovereign right to impose tribal fuel taxes, infringes upon the Tribe's sovereign right to finance and provide essential government services, infringes upon the Tribe's sovereign right to self-government and self-determination, and infringes upon the Tribe's right to conduct business and to economically develop its reservation. "The doctrine of tribal self-government, while constituting an independent barrier to the assertion of state taxing authority over activities taking place on tribal reservations, bears some resemblance to that of federal

[93] *Salt River,* 50 F.3d at 739.

[94] The Tribe has asserted that eleven percent of its fuel sales are derived from sales to reservation residents, tribal government employees and other persons who work on the reservation. The Tribe has not asserted that a majority or even a substantial portion of its fuel sales are made to reservation residents, those who primarily reap the benefits of tribal government services. It cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel. In addition, the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway that leads to the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation.

preemption."[95] Application of this doctrine requires the Court to weigh both state and tribal interests in raising revenue to provide taxpayers with essential government services.

The Tribe's interest in raising revenues to support essential tribal services is strongest when "the revenues are derived from *value generated on the reservation* by activities involving the Tribes *and* when the *taxpayer is the recipient of tribal services.*"[96] Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.[97]

The Tribe asserts that the revenues derived from the fuel sold at the Nation Station are a result of value generated on Indian lands because the casino, operated in close proximity to the gas station, generates a flow of motor vehicle traffic. The Tribe contends that the gasoline market exists because of the nearby casino, not simply because patrons can purchase gas free from state motor fuel tax. Assuming the Tribe can show that they are marketing a product, the value of which is derived on reservation land, the Tribe cannot show that those who

[95] *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404, 1412 (9th Cir.1992) (citing *White Mountain Apache Tribe,* 448 U.S. at 142, 100 S.Ct. 2578).

[96] *Colville,* 447 U.S. at 156-57, 100 S.Ct. 2069 (emphasis added).

[97] *Salt River,* 50 F.3d at 738.

ultimately take on the economic burden of the tax, the consumers, are the recipients of tribal services as opposed to state services.[98]

The Tribe proposes that the ultimate economic burden of the tax does not fall on the consumers but rather it falls on the Tribe. The Tribe bases this assertion on the presumption that the tax will destroy the Nation Station's business by burdening the Nation Station with double taxation and interfering with the Tribe's right to impose tribal taxes and to finance its government. The Court cannot agree for several reasons.

First, in *Sac and Fox,* the Tenth Circuit held that even though the legal incidence of the Kansas motor fuel tax falls on the fuel distributors, the ultimate, albeit indirect, economic burden of the Kansas motor fuel tax falls on the consumer.[99] Thus, according to the Tenth Circuit, if the Tribe can show that the ultimate economic burden falls on tribal members as the consumers of the fuel, the tax improperly interferes with internal tribal affairs.[100] Such a showing would require the Tribe to produce evidence that a substantial portion of the Tribe's retail fuel sales are to tribal members. The Tribe cannot make the required

[98] *See Sac and Fox,* 213 F.3d at 584 (stating the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer").

[99] *Sac and Fox,* 213 F.3d at 584. *See also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 607-10, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (holding that the legal incidence of the tax does not always fall upon the entity legally liable for payment of the tax); *Chickasaw Nation v. Oklahoma Tax Comm'n,* 31 F.3d 964, 972 (10th Cir.1994) (noting that the "question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.").

[100] *Id.*

showing as their own evidence indicates that only a small percentage of the retail fuel sales are made to tribe members. The Tribe presents evidence indicating that seventy-three percent of the fuel sold at the Nation Station is sold to casino patrons and only eleven percent of the fuel sales are made to persons who live or work on the reservation. Although the Tribe certainly provides substantial services to those persons who live and work on the reservation, that group of persons constitutes only a small portion of the consumers who purchase fuel at the Nation Station. The majority of the fuel consumers are not members of the Tribe and are thus recipients of state services.[101]

Second, the Tribe's contention that the state fuel tax and the tribe's fuel tax cannot coexist because the result will be double taxation and an increase in the product's cost must also be rejected. There is no question that the Tribe's power to tax transactions occurring on trust lands "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . ."[102] But, a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business.[103]

[101] The Court recognizes that the Tribe provides some governmental services to non-Indian purchasers by constructing and maintaining reservation roads and providing police protection. But, it cannot be disputed that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation.

[102] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069.

[103] *Id.* at 154-158, 100 S.Ct. 2069. *See also Gila River Indian Cmty.,* 91 F.3d 1232, 1239 (9th Cir.1996) ("The State and Tribe have concurrent taxing jurisdiction . . . [a]ccordingly, the Tribe's tax program is not undermined by the state tax.").

Further, any negative economic impact on the Tribe by the imposition of the state fuel tax is not necessarily sufficient to invalidate the tax.[104] Indeed, the state may sometimes impose a "non-discriminatory tax on non-Indian consumers of Indian retailers doing business on the reservation . . . even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[105]

Finally, the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government. The Supreme Court has held that merely because the result of imposing the fuel tax will deprive the Tribes of the revenues which they are currently receiving, does not infringe on the right of reservation Indians to "make their own law and be ruled by them."

The Tribe's interests in raising revenues simply cannot outweigh the State's legitimate interest in raising revenues through its system of taxation.[106] The State's interest in imposing such a tax is greatest when the "tax is directed at off-reservation value and when the taxpayer is the recipient of state services".[107] In this case, it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors.[108] Further, it is also

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[104] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069; *Sac and Fox,* 213 F.3d at 583.

[105] *Colville,* 447 U.S. at 151, 100 S.Ct. 2069.

[106] *Id.* at 157, 100 S.Ct. 2069. *See also ANR Pipeline,* 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

[107] *Colville,* 447 U.S. at 157, 100 S.Ct. 2069.

[108] *Sac and Fox,* 213 F.3d at 580.

undisputed that only a small part of the fuel sales are made to persons who either live or work on the reservation who are the recipient of tribal services. The majority of the fuel consumers are recipients of state services. Even if the Court accepts the Tribe's proposition that the fuel sales are a result of value generated on reservation land, the Tribe cannot show that a substantial portion of the taxpayers are recipients of tribal services as opposed to state services. For the above reasons, defendant's motion for summary judgment shall be granted on the Tribe's claim regarding tribal rights to self-government.

E. Kansas Act for Admission

In addition to claims based on preemption and tribal rights to self-government, the Tribe also asserts a claim under the Kansas Act for Admission § 1. The Kansas Act for Admission states that:

> [n]othing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory. . . .

Based on this language, the Tribe argues that the state is prohibited from taking action that impairs the Tribe's right to impose and collect its own tribal taxes, impairs the Tribes right to finance its government through tribal taxation and imposes on the Tribe's right to engage

in sovereign functions of self-government. The Tribe asserts that unlike causes of action based on federal preemption, there is no need to balance the state, federal and tribal interests for claims arising from the Kansas Act for Admission.

The Court finds that even if the Kansas Act for Admission can be read to preserve the Tribe's sovereign right to impose tribal taxes on reservation and to engage in commercial business on its reservation as proposed by the Tribe, the Court's foregoing analysis regarding tribal rights to self-government is still applicable. As mentioned above, while the Tribe has every right to impose tribal fuel taxes, by doing so it does not oust the State from imposing state tax on sales made to non-Indians. Further, even if the state tax imposes on the Tribe's ability to carry-on a commercial business by increasing the cost of the product, a state tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[109] "[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."[110] For these reasons defendant is entitled to judgment as a matter of law and summary judgment is granted on the Tribe's claim asserted under the Kansas Act for Admission.

IV. CONCLUSION

In finding that the Court has jurisdiction over this matter, the Court rejects defendant's claim to immunity based on the Eleventh Amendment and rejects defendant's

[109] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[110] *Id.*

claim that the Tribe lacks standing to bring this suit. Additionally, the Court finds, contrary to defendant's arguments, that the Hayden-Cartwright Act does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations. Finally, because no material issue of fact remains regarding the Tribe's claims arising under federal preemption, tribal right to self-government or Kansas Act for Admission and because defendant is entitled to judgment as a matter of law, defendant's motion for summary judgment is granted.

IT IS THEREFORE BY THE COURT ORDERED that State's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS SO ORDERED.

(2)

No. 04-631

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT..... 5

I. APPLYING THE *WHITE MOUNTAIN APACHE TRIBE* BALANCING-OF-INTERESTS TEST TO OFF-RESERVATION TRANSACTIONS IS CONTRARY TO THIS COURT'S FIRM PRECEDENT..... 5

II. THE UNCERTAINTY FROM APPLYING THE BALANCING TEST OFF RESERVATION THREATENS STATE TAX ADMINISTRATION, STATE TAX REVENUES AND STATE-TRIBAL RELATIONS. 8

III. THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, PRESENT THE COURT WITH AN OPPORTUNITY TO BRING CLARITY AND CERTAINTY WITH REGARD TO INDIAN TAXATION MATTERS 10

CONCLUSION..... 11

TABLE OF AUTHORITIES Page

Cases:

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) 6, 9

Hammond v. Coeur d'Alene Tribe, U.S. Sup. Ct. No. 04-624 ..... 10, 11

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 2, 5, 6, 7

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 3, 5, 7

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 4, 5, 9

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1938) 5

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 9

Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division, 107 N.M. 399, 759 P.2d 186 (1988) 5

Sac and Fox Nation v. Pierce, 213 F.3d 566 (10th Cir 2000) 9

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 5

Trotter v. Tennessee, 290 U.S. 354 (1933) 5

United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 1

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 6

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 9

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 4, 6, 7, 8, 10

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 2

Statutes and Legislative Material:

MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001) 1, 2

TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959) 2

HAYDEN CARTWRIGHT ACT 10

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three states are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax sys-

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[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

tems that followed recommendations of the Willis Committee.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing authority—an essential governmental power for States to fulfill their constitutional role—from federal encroachment.

Preserving state taxing sovereignty under our vibrant federalism remains a key purpose of the Commission. When States seek to tax transactions on Indian lands, tribes are a third concentric sovereign whose interests must properly be considered. Sorting out which sovereign has authority to impose tax on what transactions inevitably requires line drawing. The brighter the lines, the more administrable the tax, the fewer the conflicts and the lower compliance burdens on taxpayers and tax agencies.

The territorial component of sovereignty has been a key factor in forging bright-line rules. For over 170 years, the Court has imposed a bright-line standard that States have no jurisdiction over Indians on their sovereign lands unless Congress expressly authorizes it.[4] With regard to off-reservation transactions, the Court has likewise relied on a clear demarcation—that tribal sovereignty ends at the reservation boundary. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

[3] The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

[4] *E.g. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-69 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

State authority to tax non-Indians for transactions with Indians on tribal reservations raises more difficult issues. The non-Indian taxpayer is within the State and under state authority. Yet the transactions are with Indians on tribal lands, and therefore implicate tribal sovereignty. With sensitivity to both sovereigns, the Court has developed a complex and nuanced balancing test to determine whether States may impose tax in these cases. The analysis calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In the instant case, Kansas sought to impose fuel tax on non-Indian distributors for receiving gasoline off the reservation. The bright-line rule from *Mescalero Apache Tribe* should have controlled. The Tenth Circuit's erroneous use of the uncertain balancing test of *White Mountain* clouds this bright line and impacts the Commission's interest in protecting state sovereignty in two ways.

First, the Tenth Circuit's holding jeopardizes the unambiguous rules that define state authority with regard to reservations. Bright-line rules allow good relations to flourish between States and tribes and pretermit disputes and litigation between them.

This strong preference for bright-line rules has been pursued by the States in this Court even against the immediate interests of other States. In *Oklahoma*

Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 460 (1995), this Court noted that eleven States urged the retention of the "'legal incidence' test" with regard to taxation that impacts Indians and Indian tribes in Indian country, even though another State had urged adoption of more uncertain "economic reality" rule which might have furthered its cause in that litigation. The Court noted that the eleven States had favored the test because it "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.*

Second, the holding jeopardizes state authority to tax off-reservation transactions. States depend upon tax revenues to run their governments. Subjecting off-reservation transactions that may subsequently impact Indian tribes to the inexact balancing test will substantially impair States' ability to impose taxes. The decision below deprived Kansas of tax revenue it rightfully expected from a tax imposed on a non-Indian distributor receiving fuel off the reservation merely because the gasoline was later sold to a tribal retailer.

ARGUMENT

I

APPLYING THE *WHITE MOUNTAIN APACHE TRIBE* BALANCING-OF-INTERESTS TEST TO OFF-RESERVATION TRANSACTIONS IS CONTRARY TO THIS COURT'S FIRM PRECEDENT.

This Court's jurisprudence governing state authority to tax Indians and activities on Indian lands may fairly be divided into three areas, two of which

are pillars of certainty controlled by bright-line rules modifiable only by explicit congressional action. The third area is governed by the flexible and indefinite balancing-of-interests test.

States have long been barred from taxing Indians for *on-reservation* activity absent explicit *permission* from Congress. *Chickasaw Nation*; *McClanahan*; *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866).

States have long been permitted to tax *off-reservation* activity, whether conducted by Indians or others, absent express *preemption* by Congress. Long-standing precedent holds that tax exemptions are not granted by implication in recognition of the crucial importance of taxation to the very existence of each governmental entity. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1938); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). States may tax activities off-reservation, even if they involve or affect Indians, "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe*, 411 U.S. at 145. *See also Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division*, 107 N.M. 399, 759 P.2d 186 (1988), *appeal dismissed*, 490 U.S 1043 (1989) (preemption by implication doctrine inapplicable to tax on legal services performed off reservation for tribe).

These two per-se rules, one barring state taxation and the other permitting it in the absence of express congressional action, provide a certainty that furthers state tax administrability.

When States seek to tax non-Indians on reservation transactions with Indians, however, competing interests of three concentric sovereigns are in-

volved.[5] The State is asserting jurisdiction over its citizens for activity in its territory. The tribe is asserting jurisdiction over its territory and has legitimate concerns about the economic affect on its members. And all are subject to the supreme sovereignty of the federal government and Congress's expansive authority under the Indian Commerce Clause. Recognizing that three competing sovereignty interests must be weighed in allocating governmental authority in these cases, the Court abandoned an absolutist approach in favor of a more flexible implied-preemption standard in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) and *McClanahan*, 411 U.S. at 172. The Court further transformed this implied-preemption analysis into a malleable balancing-of-interests test in *White Mountain*. Under this approach the Court

> examine[s] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

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[5] See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989) ("There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian [on-reservation] wells.")

White Mountain, 448 U.S. at 144-45.

The implied-preemption balancing test has been confined exclusively to reservation activities consistent with the territorial limits of tribal sovereignty. In *McClanahan*, the Court referenced "Indian sovereignty" as "a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. In *White Mountain*, the Court noted the "unique historical origins of tribal sovereignty" as the reason for using an adaptable, implied-preemption standard in these cases, 448 U.S. at 143, and affirmed that geography matters.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry.

Id. at 151. Significantly, the Court in *White Mountain* reaffirmed the *Mescalero Apache Tribe* bright line that off the reservation and outside the boundaries of tribal sovereignty an express congressional statement of tax exemption is required. 448 U.S. at 144, n. 11. In each case, tribal sovereignty, which exists only over tribal territory, has been the conceptual basis for the implied preemption analysis.

Applying the balancing test to off-reservation transactions also makes no practical sense. The State's interest should virtually always predominate with regard to any off-reservation transaction. The erroneous application of the balancing test below highlights this fact. The Tenth Circuit improperly focused on an activity the State did *not* tax—the retail sale on the reservation—rather than on the ac-

tivity it *did* tax—the receipt of gasoline by the distributor in Troy, Kansas. State roads radiating out from Troy include the very state roads that carried the distributor's gasoline, along with many of the tribal casino's customers, to the reservation. The State's interest in obtaining road fund revenues for its 60 mile portion of this trip formidably predominates over tribal interest in funding the 1½ mile reservation portion.

The Tenth Circuit's decision below flouts this Court's firm precedent by applying the implied-preemption balancing test to off-reservation activity.

II

THE UNCERTAINTY FROM APPLYING THE BALANCING TEST OFF RESERVATION THREATENS STATE TAX ADMINISTRATION, STATE TAX REVENUES AND STATE-TRIBAL RELATIONS.

The Tenth Circuit decision, if left unchecked, threatens dire consequences for state tax administration. By applying the vagaries of the balancing test where it should not have—to a transaction that occurred off the reservation where the gasoline distributor received the gasoline—the decision greatly expands uncertainty about state taxing authority. Any tax imposed on a transaction that may ultimately have an economic consequence on a reservation will be subject to challenge. How can taxpayers know whether items on which they have paid tax will subsequently be resold or used on a reservation? Under the Tenth Circuit's ruling, does the creation of a tribal casino insulate from taxation any off-reservation purchase for the casino, or for any

related enterprise, or for any enterprise which can claim a benefit from the casino? Will state tax imposed on all off-reservation purchases by tribal entities be subject to defeasance?

The unpredictability of the balancing test is well reflected by comparing the Tenth Circuit's decision below, balancing state and tribal interests in the tribe's favor, with its earlier decision in *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir 2000), *cert. denied*, 531 U.S. 1144 (2001), balancing seemingly indistinguishable interests in the State's favor.

Moreover, the manner in which the Tenth Circuit applied the balancing test will acerbate uncertainty. It balanced interests without reference to a single federal law that might—even by implication—preempt state authority to tax. This would leave every decision to the unfettered judgment of each trial court, unhinged from federal law. This Court has explicitly rejected such generalized use of congressional acts that advance tribal sovereignty and promote economic development as an all-purpose justification for preempting any state action that might have an adverse economic affect on tribes. *Cotton Petroleum*, 490 U.S. at 183, n. 14; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

Additionally, this extension of the balancing test will impact state regulatory authority. The "particularized inquiry" of *White Mountain* applies to state regulatory, as well as state tax, authority. *Chickasaw Nation*, 515 U.S. at 458 ("We have balanced federal, state and tribal interests in diverse contexts, notably in assessing state regulation that does not involve taxation.") *See also Oregon Dep't of Fish &*

Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 765 (1985). States impose many regulations on the off-reservation manufacture of goods and provision of services. A tribe, employing the Tenth Circuit's reasoning, can presumably challenge a regulation under *White Mountain* balancing standards to the extent that it has what the tribe perceives as an untoward impact on tribal interests.

Judging tax authority based on balancing interests can provide needed flexibility when demands of three conflicting sovereigns must be satisfied. The unprecedented and unwarranted extension of that test to State tax authority over off-reservation activities subject only to federal and state sovereignty, however, will cause great uncertainty and turmoil.

III

THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, PRESENT THE COURT WITH AN OPPORTUNITY TO BRING CLARITY AND CERTAINTY WITH REGARD TO INDIAN TAXATION MATTERS.

Your amicus respectfully suggests that Idaho's pending petition for certiorari in *Hammond v. Coeur d'Alene Tribe*, No. 04-624, provides the court with an opportunity to reinforce the two pillars of certainty in Indian taxation matters. The instant case is properly controlled by the requirement of express congressional *preemption*, clearly lacking here. The *Hammond* case is properly controlled by express congressional *permission*, there provided by the Hayden-Cartwright Act which authorizes state taxation of "licensed traders" on "United States military

or other reservations," a combined terminology that uniquely refers to Indian reservations. *Hammond* also implicates the off-reservation bright-line standard in the first issue presented: whether a federal court may, despite an express allocation by the state legislature of the legal incidence of the motor fuels tax to a distributor, nonetheless deem the incidence of the tax to be borne by the retailers.

Hammond serves as a suitable companion to the present case, and consideration and resolution of the cases together would be of benefit to the States, to the tribes, and to the public.

CONCLUSION

The decision below radically departs from this Court's jurisprudence governing state authority to tax off-reservation activity. It threatens the ability of States to raise revenues. It reduces certainty in state tax administration and stability in state-tribal relations. Let stand, the decision will permit contradictory lower court decisions, which will serve to encourage litigation. Your amicus respectfully requests that the Court grant the Petition and issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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In The Supreme Court of the United States

STEPHEN RICHARDS, in his official capacity as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, CONNECTICUT, IDAHO, IOWA, MASSACHUSETTS, MISSOURI, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The much litigated rule of *White Mountain Apache Tribe v. Bracker* provides for a nuanced weighing of state, federal, and tribal interests. *Bracker* has been heretofore applied by this Court to determine whether state authority over non-Indians acting within Indian country has been preempted; this Court has not applied that rule beyond Indian country. State authority over non-Indians beyond Indian country has been found to be preempted only by an express congressional direction.

Should the rule of *Bracker* be applied to preempt a state tax on the receipt off reservation of fuel by a non-Indian distributor merely because the non-Indian distributor later, and still off reservation, sells the fuel to an Indian tribe for use on reservation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE APPLICATION OF *WHITE MOUNTAIN APACHE TRIBE V. BRACKER* TO AN OFF RESERVATION TRANSACTION BETWEEN A NON-INDIAN AND A TRIBE IS CONTRARY TO THIS COURT'S PRECEDENT	3
II. THE *BRACKER* BALANCE OF INTEREST TEST HAS NO DOCTRINAL "FIT" OFF RESERVATION OR BEYOND THE LIMITS OF "INDIAN COUNTRY."	4
III. THIS COURT HAS WARNED AGAINST EXPANDING THE APPLICABILITY OF THE *BRACKER* BALANCING TEST	5
IV. THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, TOGETHER PRESENT THIS COURT WITH AN OPPORTUNITY TO CLARIFY BASIC MISCONCEPTIONS OF COURTS OF APPEALS WITH REGARD TO INDIAN TAXATION MATTERS	6
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona Dep't of Revenue v. Blaze Construction Co. Inc., 526 U.S. 32 (1999)	5, 6
Duro v. Reina, 495 U.S. 676 (1990)	5
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	3
Nevada v. Hicks, 533 U.S. 353 (2001)	2
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	3
Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)	3
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991)	3
Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)	3
United States v. New Mexico, 455 U.S. 720 (1982)	6
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	1, 2, 3, 4, 5

INTEREST OF *AMICI CURIAE*

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137 (1980), this Court considered the "extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." This Court held that state authority over non-Indians on a reservation might be preempted dependent upon the result of a "particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . ." *Id.* at 145. The inquiry included investigation into the language of treaties and statutes, both in terms of the "broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. *Bracker* was specifically limited to questions regarding state authority *on* the reservation. *Bracker* specifically distinguished questions relating to state authority off reservation, finding that Indians (and necessarily non-Indians) were generally subject to "'nondiscriminatory state law'" off the reservation "in the absence of 'express federal law to the contrary.'" *Id.* at 144 n.11.

The effect of the decision below with regard to off reservation transactions was to replace the per se rule of no preemption absent "express federal law to the contrary" with the complex and nuanced rule of *Bracker*. The *amici* states have three discrete points of interest in this case.

Two of the interests of the states have been cogently expressed by the Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioners, at 3-4. First, the states, and we submit, the tribes, have a joint interest in the establishment and maintenance of bright line rules of jurisdiction. *Id.* at 3. Such bright lines effectively deter divisive jurisdictional battles. Second, the states have a

compelling interest in maintaining their ability to tax. State governments provide services to Indians and non-Indians alike, and cannot sacrifice their taxing authority without legitimate cause. *Id.* at 4.

Third, and beyond the scope of interests identified by the Multistate Tax Commission, the states have a strong interest in maintaining their authority to *regulate* Indians and non-Indians off reservation. The court below applied the *Bracker* test in the context of an off reservation *tax* controversy. *Bracker*, however, is a test of general application on the reservation to the activities of non-Indians; it applies to both tax *and non-tax matters*. *See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001). The decision below logically could require the balancing of state, federal, and tribal interests with regard to *any* activity of a non-Indian off reservation, whether related to taxation or not. It affects all states, not simply those with Indian lands. States have never been subjected to divestment of their regulatory authority off reservation through the *Bracker* test, and resist such an extension as unfounded and illegitimate.

SUMMARY OF ARGUMENT

This Court has established a bright line rule for determining when state authority over non-Indians acting beyond Indian country can be found to be preempted – when, and only when, federal law expressly provides. The Court below ignored that basic precept of this Court's cases, and instead applied the complex interest balancing test of *White Mountain Apache Tribe v. Bracker* to find

preemption of a state law imposing a tax on a non-Indian fuel distributor who received fuel off reservation.

The bright line rule of the cases with regard to off reservation transactions should be adhered to because it is the clear precedent of the cases, because it is logical, and because it simplifies relations between the states and the tribes, and so works to avoid divisive litigation.

ARGUMENT

I.

THE APPLICATION OF *WHITE MOUNTAIN APACHE TRIBE V. BRACKER* TO AN OFF RESERVATION TRANSACTION BETWEEN A NON-INDIAN AND A TRIBE IS CONTRARY TO THIS COURT'S PRECEDENT.

This Court has found that the interest balancing test set out in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), should be confined to transactions occurring on reservation or within Indian country. In *Bracker* itself, the Court found that "'Indians going beyond reservation boundaries'" are subject to "'nondiscriminatory state law'" in the absence of "'express federal law to the contrary.'" *Bracker*, 448 U.S. at 144 n.11 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). This Court, moreover, has regularly applied this rule. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464-465 (1995); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18

(1983). Given the force and history of the Court's pronouncements in this regard, it is remarkable that the Court of Appeals for the Tenth Circuit did not even pause to consider the point. In any event, the attempt of the Tenth Circuit to apply the *Bracker* rule off reservation is directly contrary to the repeated statements and holdings of this Court, and itself merits the grant of certiorari.

II.

THE *BRACKER* BALANCE OF INTEREST TEST HAS NO DOCTRINAL "FIT" OFF RESERVATION OR BEYOND THE LIMITS OF "INDIAN COUNTRY."

It is no surprise that this Court has not applied the *Bracker* interest balancing test off reservation. The very words used in pronouncing and explaining the test preclude its use off reservation.

In explaining the doctrinal basis for the test, this Court stated that the "tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 448 U.S. at 143. In articulating the test itself, the Court required examination of the language of "federal treaties and statutes" in addition to the "notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. The test is directed at the intersection of tribal and state sovereignty; it would be doctrinal folly to transport the doctrine off reservation because there is no "tradition of Indian sovereignty" off reservation.

Moreover, it is not only historically true that the exercise of tribal sovereignty has been confined to Indian

reservations, it is virtually demanded in the American system. This is because tribes have license to act beyond the confines of the United States Constitution and the Bill of Rights. *Duro v. Reina*, 495 U.S. 676, 693 (1990). Indeed, to recognize a historical sovereignty of tribes beyond the boundaries of Indian country and Indian reservations would raise serious and profound questions with regard to invasion of the rights of American citizens entitled to the protections of the Constitution and the Bill of Rights.

III.

THIS COURT HAS WARNED AGAINST EXPANDING THE APPLICABILITY OF THE *BRACKER* BALANCING TEST.

Not only has this Court consistently found that the *Bracker* test does not apply off reservation, it has restricted its application even *on* reservation. In *Arizona Dep't of Revenue v. Blaze Construction Co., Inc.*, 526 U.S. 32 (1999), this Court considered whether a non-Indian who contracted with the Bureau of Indian Affairs for a highway improvement project on a reservation was subject to the *Bracker* balance of interest test in a tax context. The Court implied that the "'particularized examination'" of the cases, including *Bracker*, had been called for with regard to "on-reservation activity" when the "legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members." 526 U.S. at 37.

This Court, however, refused to extend the balancing test to a case in which a "State seeks to tax a transaction between the Federal Government and its non-Indian private contractor" even though the contractor was dealing with

the Bureau of Indian Affairs with regard to a contract on the reservation. *Id.* at 37. The Court declared that "[i]nterest balancing . . . would only cloud the clear rule established by our decision in [*United States v.*] *New Mexico* [455 U.S. 720 (1982)]." *Id.* The Court identified certain of the same interests which have motivated the states in the filing of this *Amicus*, finding that the "need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard. . . ." 526 U.S. at 37. The Court concluded that the political processes of the states and the federal government were appropriate for determining whether to exempt the non-Indian contractor from state taxation. *Id.* at 38.*

IV.

THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, TOGETHER PRESENT THIS COURT WITH AN OPPORTUNITY TO CLARIFY BASIC MISCONCEPTIONS OF COURTS OF APPEALS WITH REGARD TO INDIAN TAXATION MATTERS.

Amici respectfully suggests that not only would it be appropriate for the Court to accept certiorari in this case, but that it would also be appropriate for this Court to accept certiorari in *Hammond v. Coeur d'Alene Tribe of Idaho*, No. 04-624. The latter case raises the question of whether a federal court may, despite an express allocation

* Indeed, many states do exempt tribes from various taxes imposed both on and off reservation. *See* SDCL 10-45-10. Other taxes, however, remain payable by an entity with whom the tribe deals. Taxes such as the contractor's excise tax would fall into this category in South Dakota.

by the state legislature of the legal incidence of the motor fuels tax to a distributor, nonetheless deemed the incidence of the tax to be borne by the retailers. The *Hammond* case raises the related issue of whether the Hayden-Cartwright Act, which uses the term "United States military or other reservations," provides "express congressional authorization" for fuel taxation on an Indian reservation. *Hammond*, together with the present case, present the Court with an opportunity to address serious misconceptions which continue to undermine effective tax administration and to encourage needless and divisive litigation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit, consistent with decisions of other courts, including this Court, properly applied *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the state fuel tax under review predominately relates to "on-reservation" activity.

2. Whether the well-established analytical framework of *White Mountain Apache*, which courts, including this Court, have consistently applied for over two decades, should be overruled.

3. Whether the Tenth Circuit's fact-specific application of the *White Mountain Apache* framework, which carefully assessed all relevant factors in light of the unique facts of this case, should be disturbed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 3
A. Factual Background 3
B. The District Court Proceedings 6
C. The Tenth Circuit's Decision 7
REASONS FOR DENYING THE PETITION 10
CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999) 22, 23

In re Blue Lake Forest Products, Inc., 30 F.3d 1138 (9th Cir. 1994) 14

Blunk v. Arizona Department of Transportation, 177 F.3d 879 (9th Cir. 1999) 14

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 9, 18, 20, 26, 27

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 17, 18

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 24

Maryboy v. Utah State Tax Commission, 904 P.2d 662 (Utah 1995) 15

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..... *passim*

Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996) 15, 16

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 20, 24, 26

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 2, 23

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993) 18

People v. McCovey, 685 P.2d 687 (Cal. 1984) 15

Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) 2, 17, 23, 24

Ramah Navajo School Board, Inc. v. New Mexico Taxation & Revenue Department, 977 P.2d 1021 (N.M. Ct. App. 1999) 16

Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation & Revenue, 759 P.2d 186 (N.M. 1988) 16

Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000) 6, 9, 19, 27

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 2, 8, 21, 25

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

STATUTES

4 U.S.C. § 104 7

25 U.S.C. §§ 2701-2721 3

25 U.S.C. § 2701(4) 27

25 U.S.C. § 2702(1) 27

Ariz. Rev. Stat. § 42-3302 23

Kan. Stat. Ann. § 79-3401 *et seq* 5

Kan. Stat. Ann. § 79-3402 ..... 12, 20

Kan. Stat. Ann. § 79-3408(b) 5

Kan. Stat. Ann. § 79-3408(d) 11, 20
Kan. Stat. Ann. § 79-3408(d)(1) 5
Kan. Stat. Ann. § 79-3408(d)(2) 5
Kan. Stat. Ann. § 79-3408(d)(3) 5
Kan. Stat. Ann. § 79-3408(d)(5) 5
Kan. Stat. Ann. § 79-3409 ..... 5, 11
N.M. Stat. Ann. § 7-13-4.4 23
Nev. Rev. Stat. § 370.503 23
S. Ct. R. 10 16

MISCELLANEOUS

Note, *Intergovernmental Compacts in Nature American Law: Models for Expanded Usage,* 112 Harv. L. Rev. 922 (1999) 23

Richard J. Ansson, Jr., *State Taxation of Non-Indians [Who] Do Business With Indian Tribes,* 78 Or. L. Rev. 501 (1999) 23

BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied. The Tenth Circuit held that, pursuant to the well-established standards set forth by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), a Kansas fuel tax assessed on gas delivered to a single gas station operated by respondent Prairie Band Potawatomi Nation on its reservation is preempted. Assessing the "unique facts of this case," Pet. App. 7a, the Tenth Circuit relied principally on the "close nexus between the Nation's fuel sales and its gaming enterprise," *id.* at 8a and the fact that the Nation's fuel sales are "an integral and essential part of the Nation's on-reservation gaming enterprise," *id.* at 7a. In so ruling, the Tenth Circuit recognized a narrow sphere of preemption where, as here, a state tax is imposed on fuel delivered to a Tribe for sale at market prices on its reservation by an integral part of a tribal gaming enterprise that is regulated under federal law. The Tenth Circuit properly applied this Court's precedent to the specific and unique facts of this case, and the State's request for error correction should be denied.

The State attempts to manufacture a basis for this Court's review, claiming a conflict in the lower courts concerning whether *White Mountain Apache* or *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("*Mescalero*"), applies to "off-reservation" conduct. But even assuming such a conflict, it is not presented by this case. This case falls within the narrow range of cases in which the conduct that the State seeks to regulate has an off-reservation aspect, but at its core concerns on-reservation activity. In that situation, the courts of appeals and state supreme courts have uniformly determined that the *White Mountain Apache* analysis applies. Indeed, the Ninth Circuit – cited by petitioner as allegedly in

conflict with the decision below – *shares* the Tenth Circuit's judgment that certain activities are considered "on-reservation" for the purpose of triggering *White Mountain Apache*, even if some significant off-reservation conduct is involved. This Court as well has rejected the notion that the presence of even substantial off-reservation conduct inevitably precludes reliance on the balancing test set forth in *White Mountain Apache*. Thus, the Tenth Circuit's application of *White Mountain Apache* rather than *Mescalero* to a state tax that, although it has off-reservation components, principally involves and burdens on-reservation activity, is fully consistent with the decisions of this Court.

Lacking any true conflict concerning the applicability of *White Mountain Apache*, petitioner is left to make a meritless plea for overturning that decision on the ground that a bright line rather than a balancing test is most appropriate. But petitioner merely rehashes arguments that have been rejected by this Court on numerous occasions. Indeed, since *White Mountain Apache* and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"), were decided nearly 25 years ago, this Court (and the lower courts) have regularly applied a balancing analysis to States' evolving attempts to regulate activities affecting Indian tribes, recognizing that "particularized examination[s] of the relevant state, federal and tribal interests," rather than "'mechanical or absolute conceptions of state or tribal sovereignty'" are best suited to this area of the law. *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (quoting *White Mountain Apache*, 448 U.S. at 145); *see, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) ("*Chickasaw*") (describing the balancing inquiry applicable where "the legal incidence of the tax rests on non-Indians").

It is thus unsurprising that petitioner has completely failed to substantiate its claims of "chaos" allegedly caused by the *White Mountain Apache* framework. Pet. at 18. Indeed, if anything, it is the States' continually evolving efforts to avoid preemption – and not any inherent flaw in *White Mountain Apache* – that has generated litigation about the meaning of that framework. Because *White Mountain Apache* provides a well-established analytic structure to account for the varying state, federal, and tribal interests that are at stake in any particular preemption analysis, it is – and should remain – good law.

STATEMENT OF THE CASE

A. Factual Background

1. Respondent Prairie Band Potawatomi Nation ("Tribe" or "Nation") is a federally recognized Indian tribe whose sizeable 121-square-mile reservation is located in a remote and rural area of Jackson County, Kansas. On this reservation, the Nation constructed a casino complex, which it now owns and operates under the regulation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. The casino is linked to the state highway system by means of a two-mile access road that leads from United States Highway 75 (the main road leading to the reservation) to the Nation's casino. The Tribe has assumed exclusive responsibility for maintaining this access road, and Kansas does not contribute funds to cover these maintenance costs.

The tribally owned-and-operated gas station and convenience store ("Nation Station") at issue here is an integral part of the Tribe's casino enterprise. The Tribe financed and built the Nation Station on the access road on the reservation shortly after the casino was built, principally to service the influx of casino patrons who otherwise would

not travel to this remote and rural area, as well as other casino- and reservation-related traffic. The Nation Station sells its fuel at fair market prices and does not advertise an exemption from state fuel taxes. For this reason, it is undisputed that the Nation Station's existence is not based upon "'marketing a tax exemption.'" Pet. App. 4a.

Rather, as the undisputed testimony in the record confirmed, the Nation Station's "'value marketed'" derives from "'the business generated by the casino and from employees of the casino and [the Nation's] government and residents.'" Pet. App. 3a. Indeed, 73% of the Nation Station's fuel customers are casino patrons and employees, and another 11% otherwise live or work on the reservation. As the record makes clear, the Nation Station is a location-dependent business integral to the casino, without which "'there would not be enough traffic to support [it] in its current location.'" *Id.*

By the same token, the Nation Station is an integral part of the Tribe's governmental system of tribal taxation. The Tribe imposes a tribal tax on retailers of motor fuel of 16 cents per gallon for gasoline and 18 cents per gallon for diesel (increased in January 2003 to 20 cents for gasoline and 22 cents for diesel). Under the Nation's tax code, all of this revenue pays for the construction, maintenance, and improvement of roads, bridges, and rights-of-way on or near the reservation, including the casino access road. The Nation Station is the sole source of the Tribe's fuel tax revenue, which is roughly $300,000 per year. Since the casino was built, the Nation has committed substantial resources to the construction and maintenance of the roads to the casino. For example, in 1997 and 1998, the Nation spent approximately $1.2 million to improve and pave the casino access road and make improvements to the road's intersection with Highway

75, and the Nation has committed to funding further improvements to this access road and intersection. In contrast, Kansas does not contribute funds to cover the costs of maintaining this access road to the reservation and casino.

2. Prior to 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands, because Kansas law placed the legal incidence of the tax on fuel retailers (such as the Nation Station), and not on fuel distributors. Pet. App. 25a. In 1995, Kansas amended its Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997), in order to place the legal incidence of the tax on fuel distributors. *See* Kan. Stat. Ann. § 79-3408(b). Two aspects of the tax are particularly relevant.

First, the Kansas tax operates with substantial exemptions that condition liability upon the place and manner of ultimate use. For example, the statute exempts fuel distributed from Kansas "to any other state or territory or to any foreign country," under Kan. Stat. Ann. § 79-3408(d)(1), it exempts fuel sold from one distributor to another under Kan. Stat. Ann. § 79-3408(d)(5), and it exempts fuel sold or delivered to the United States, its agencies, and its contractors under Kan. Stat. Ann. § 79-3408(d)(2), (3). Thus, whether the tax is owed and collected by the State depends entirely on where and to whom the fuel is distributed for retail sale. For instance, if it is distributed to a retailer in neighboring Oklahoma, then no tax is due.

Second, the amended statute acknowledges that distributors inevitably will pass on the cost of the tax in their wholesale price to the retailer – here, the Nation Station. *See* Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment *shall be entitled* to charge and collect an amount, including the cost of doing business

that could include such tax on motor-vehicle fuels . . . sold or delivered by such distributor, as a part of the selling price.") (emphasis added); *Sac and Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 579 (10th Cir. 2000) ("*Sac and Fox*").

3. The adverse impact of the Kansas tax on the Tribe and its government is undeniable. It is undisputed that it is impossible for the Nation to impose its tax on the Nation Station in addition to the state tax. Indeed, the combination of the state and tribal fuel taxes would result in an extraordinarily high tax burden twice that of the Nation Station's competitors for a product with a highly elastic demand curve. As the Nation's expert explained, in testimony accepted by the courts below, "'the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero.'" Pet. App. 12a. Thus, the state tax would deprive the Nation of virtually all of its tribal fuel tax revenues used by its government to fund road projects necessary for its casino and reservation. In contrast, Kansas' potential fuel tax revenues from the Nation Station represent only 0.09% of the state motor fuel taxes collected in 1999, and only a trivial portion of the State's overall tax revenues. Brief for Appellee at 16 (10th Cir. filed Oct. 22, 2003).

B. The District Court Proceedings

The Nation brought suit in the United States District Court for the District of Kansas, seeking to enjoin the State from collecting motor fuel tax for fuel delivered to the Nation Station. The Nation claimed principally that the state tax was prohibited both because it was preempted by federal law and because it infringed upon the Tribe's right to self-

government. Petitioner moved for summary judgment, disputing these contentions.[1]

The district court granted summary judgment to petitioner. With respect to the issues presented here, the district court's analysis proceeded from the assumption that the Kansas tax implicated "transactions occurring *on reservation land*." Pet. App. 44a (emphasis added). As the court properly recognized, in such circumstances, under *White Mountain Apache*, two separate but distinct doctrines can pose a barrier to the assertion of state taxation: "federal preemption and tribal rights to self-government." *Id.* The court then analyzed the Nation's challenge under both doctrines and upheld the validity of the state tax.

C. The Tenth Circuit's Decision

The Tenth Circuit reversed. Applying the balancing test set forth in *White Mountain Apache*, the court of appeals concluded that "under these particular facts," the Kansas tax "interferes with and is incompatible with strong tribal and federal interests against taxation." Pet. App. 14a.

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[1] The State also asserted (among other things) that the Hayden-Cartwright Act, 4 U.S.C. § 104, explicitly authorizes the State's taxation of fuel distributed to on-reservation Indians. The district court rejected that contention. Pet. App. 43a-44a. The State neither appealed that determination, nor raised it in its petition before this Court. The Hayden-Cartwright issue is presented by another petition currently under review by the Court. *See Hammond v. Coeur d'Alene Tribe of Idaho*, No. 04-624 (U.S. filed Nov. 5, 2004). Because there is no longer a Hayden-Cartwright issue in the instant case, and because the only other issue in *Hammond* – legal incidence of a fuel tax – is not disputed here, the resolution of *Hammond* has no bearing on the instant petition.

Driving the Tenth Circuit's analysis was that the tax, although nominally involving off-reservation "distribution," was intimately connected with *on-reservation* tribal activity. Thus, it was appropriate on "the unique facts of this case" to "view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 7a. Indeed, the Tenth Circuit deemed "critical" to its analysis the "close nexus between the Nation's fuel sales and its gaming enterprise," explaining that "the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides." *Id.* at 8a.

The Tenth Circuit thus viewed the Nation's interests in avoiding the tax to be "particularly strong," a conclusion that flowed from this Court's decision in *Colville*, which held that a Tribe's interest is the strongest for revenues "'derived from value generated on the reservation by activities involving the Tribes.'" Pet. App. 7a (quoting *Colville*, 447 U.S. at 156-57).[2] The Tenth Circuit was careful to distinguish the "unique" situation before it from the situation involving a stand-alone gas station deriving business from marketing a state tax exemption. For those stations, the court of appeals made clear that it "would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians." Pet. App. 8a. Indeed, in *Sac and Fox*, a case involving the application of this exact Kansas tax to other Kansas Tribes, the Tenth Circuit found insufficient

[2] Notably, petitioner has conceded that under *Colville*, "State taxes generally may not be imposed on non-Indians where revenues burdened by the tax are derived from 'value generated on the reservation by activities' in which [Indians] have a significant interest." Brief for Appellee at 48 (10th Cir. filed Oct. 22, 2003).

evidence that the state tax burdened commerce derived from value generated on Indian lands. *Sac and Fox*, 213 F.3d at 583-85.[3]

The Tenth Circuit also emphasized that, unlike the situation in *Sac and Fox* and *Colville*, the Nation's "fuel market does not exist because of a claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities." Pet. App. 8a-9a. Indeed, the Nation Station sells fuel at fair market prices and 73% of its customers are casino patrons and employees. *Id.* at 3a-4a. Thus, just as in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ("*Cabazon*"), these customers "spend extended amounts of time using the entertainment services offered by the Nation," and are not simply lured to the reservation by low prices. Pet. App. 11a.

The Tenth Circuit also correctly recognized that the Nation's interests are further strengthened because the Nation Station represents the Nation's only source of fuel tax revenue, which is used to maintain the reservation's roads and infrastructure, including "to provide better access from the main federal highway to its casino." Pet. App. 11a-12a. The record reflects the Nation's documented use of the fuel revenue to improve the roads surrounding the casino area, whereas "Kansas does not contribute funds to cover the costs of maintaining this access road." *Id.* at 12a. Furthermore, the Court stressed that it was undisputed that it would not be "economically feasible" for both the Nation and the State to impose taxes with respect to the Nation Station's fuel, and thus, if the State's tax were permitted, the Nation would

[3] The Tenth Circuit ordered a narrow remand in *Sac and Fox*, and the case was thereafter voluntarily dismissed, preserving the application of the Kansas fuel tax at issue there.

unequivocally lose its fuel tax revenue used to fund tribal government services for the casino operation and its customers. *Id.*

Finally, the Tenth Circuit determined that the Nation's interests are directly aligned with the "strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal government," as embodied in the specific federal statutes under which the casino is federally regulated, as well as numerous other legislative, executive and judicial sources. Pet. App. 12a-13a. In contrast, the Tenth Circuit recognized that the State's generalized interest in raising revenue is particularly weak where, as here, the tax is directed at value generated on the reservation and the State does not provide financial assistance to the Nation for the upkeep of the surrounding roads. Accordingly, the court of appeals ruled the Kansas tax invalid "as it applies to the Nation's fuel." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's consideration. Petitioner's principal contention is that the decision below creates a split of authority as to whether taxation of "off-reservation" conduct of non-Indians is properly evaluated under the framework articulated in *White Mountain Apache*, which requires courts to balance federal, state, and tribal interests to determine whether state regulations affecting Indians are preempted by federal law, or the framework articulated in *Mescalero*, which held that States may generally regulate off-reservation conduct of Indians, absent express preemption by Congress. According to petitioner, the Tenth Circuit mistakenly applies the *White Mountain Apache* analysis to taxation of off-reservation

activities of non-Indians, in alleged conflict with decisions of other circuits.

Whatever the merits of petitioner's contentions as an abstract matter, the dispositive fact here is that the issue petitioner raises is not presented by this case, because this is not a case involving entirely off-reservation conduct. To the contrary, although the non-Indian conduct at issue (distribution of fuel) has an off-reservation aspect (the location of the fuel distributor), it overwhelmingly concerns on-reservation activity, in at least three important senses.

First, the motor fuel tax at issue principally concerns the on-reservation delivery and use of fuel, and the passing on of the fuel tax burden to the on-reservation Nation Station from the distributor, *see* Kan. Stat. Ann. § 79-3409. Indeed, under the Kansas fuel tax statute, whether the state fuel tax is ultimately imposed on a distributor is completely dependant upon the location and identity of the retailer to whom the fuel is sold. *See* Kan. Stat. Ann. § 79-3408(d). Thus, it is not until the fuel is delivered to the Indian retailer in Kansas that the distributor's tax liability is finally determined, because it is only then that the distributor can be sure that none of the statutory exceptions apply. *See id.* This statutory structure, which exempts categories of fuel less likely to be used for travel on state roads, reflects the unique nature of motor fuel taxes, which generally are designed not for general revenue collection, but rather for funding the upkeep of state roads – an interest of less importance to the state where, as here, the fuel is delivered on-reservation for sale there.[4]

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[4] As Kansas and other states previously have stated to this Court: "State motor fuel taxation is unusual for at least one important

Second, the fuel's ultimate use is for on-reservation sales – largely to patrons and employees of the Tribe's gaming enterprise (and to other reservation residents) – and the tribal tax revenues from the Nation Station flow directly to the reservation roads that serve the casino and its customers. As the Tenth Circuit found, the Nation Station's fuel sales are thus "an integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 7a.

Third (and related), the Tribe is *not* marketing a tax exemption, but is instead selling the gas at market prices. It is thus the on-reservation value of the casino enterprise, and not any tax exemption, that is generating the value provided by the Nation Station's fuel sales.

Thus, the Tenth Circuit did not, as petitioner claims, apply *White Mountain Apache* to off-reservation conduct.

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reason: The resulting revenue typically is devoted to expenditure for the construction, maintenance, and repair of highways, roads, other transportation-related infrastructure, and associated administrative responsibilities. The exaction thus facilitates the very activity to which the tax relates, namely the operation of motor vehicles." Brief *Amicus Curiae* of the States of Idaho *et al.*, *South Dakota Dep't of Revenue v. Pourier*, (U.S. filed May 10, 2004) (No. 03-1401), *cert. denied* 124 S. Ct. 2400 (2004). The Kansas motor fuel tax statute makes clear the tax's narrow purpose "of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds heretofore issued for highways included in the state system of the state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever." Kan. Stat. Ann. § 79-3402.

Rather, despite the presence of some off-reservation activity, the motor fuel tax as applied to the Nation Station involved principally *on-reservation* activity. Pet. App. 44a. In such a situation, this Court has repeatedly held that the balancing analysis of *White Mountain Apache* applies. *Infra* at 17-18.

The core of petitioner's challenge is thus the Tenth Circuit's fact-bound conclusion that this case is properly viewed as an "on-reservation" case. As noted, however, in light of the peculiarities of the motor fuel tax at issue, the unique relationship between the Nation Station and the casino, and the absence of any marketing of a tax exemption, the facts presented provide no basis to disturb the determination of the courts below that this case is properly an on-reservation case to which *White Mountain Apache* applies. In any event, such a request for error correction is not an issue worthy of this Court's review.[5]

2. The absence of any issue worthy of review is further made plain by the fact that other courts – including those cited by petitioner as allegedly creating a conflict here – have similarly applied *White Mountain Apache* to on-reservation activities that nevertheless have a significant off-

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[5] Not only do the statute's numerous tax exemptions based on identity of the retailer justify treating this case as an "on-reservation" case for the purpose of *White Mountain Apache*, but these same exemptions demonstrate the discriminatory nature of the statute. Because the Kansas tax discriminates against the Nation, as compared to other similarly situated entities, it must be struck down, even if the *Mescalero* "off-reservation" analysis applies. *See Mescalero*, 411 U.S. at 148-49. Because the courts below concluded that the tax at issue is "on-reservation," they have not ruled on this discrimination issue, and most certainly have not, as petitioner states, Pet. at 5, concluded that the tax is nondiscriminatory.

reservation aspect. For example, petitioner claims that the Tenth Circuit's opinion directly conflicts with *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994) (per curiam). There, the Indian tribe filed suit in an off-reservation company's bankruptcy proceedings, claiming that the tribe's entitlement to certain timber proceeds derived from the company's on-reservation logging operation was superior to an entitlement to the same proceeds claimed by an off-reservation bank. *Id.* at 1139-40. The Ninth Circuit recognized that the case "implicates an off-reservation relationship between two non-Indian actors (Blue Lake and the bank)." *Id.* at 1141. Nevertheless, the Ninth Circuit "deem[ed] it an on-reservation case for purposes of preemption" because "the essential conduct at issue occurred on the reservation: the severance of timber and its removal without proper compensation." *Id.* As the Ninth Circuit explained, in reasoning directly applicable to the instant case: "the Indian enterprise at the heart of this dispute – the timbering lands – is located on, not off, the reservation." *Id.* (contrasting *Mescalero*). Consistent with the Tenth Circuit's decision here, the Ninth Circuit thus applied the *White Mountain Apache* balancing test.[6]

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[6] In the other Ninth Circuit case cited by petitioner, *Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999), the Court concluded that the *White Mountain Apache* analysis did not apply, because the Indian billboards that the State sought to regulate were located completely outside of Indian country. *Id.* at 882-84. The dispute in *Blunk* concerned whether the land at issue constituted Indian country, and no argument was made that – assuming the billboards were off-reservation – the core of the conduct regulated was, as here, on-reservation. Rather, because the billboards were located entirely outside of Indian country, they were identical to the completely off-reservation ski

Like the Ninth and Tenth Circuits, other courts have reached similar conclusions regarding state attempts to regulate core on-reservation conduct even when it has a significant off-reservation aspect. In *People v. McCovey*, 685 P.2d 687 (Cal. 1984) (en banc), for example, the California Supreme Court applied *White Mountain Apache* and concluded that California was preempted from regulating the *off-reservation* sale of fish by Indians. *See id.* at 697. The Court distinguished *Mescalero*, because "the Indian activity in [*Mescalero*] occurred entirely off the reservation, while this case involves on-reservation fishing followed by an off-reservation sale." *Id.*; *cf. Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662, 667-69 (Utah 1995) (applying *White Mountain Apache* and distinguishing *Mescalero*, in concluding that Utah was preempted from taxing the income of a tribal member providing on-reservation mental health services, notwithstanding that the tribal member "participates in administrative and training activities off the Reservation").

The other cases cited by petitioner similarly create no conflict. *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), for example, has nothing to do with the issues presented here. That case concerned whether certain property constituted Indian country, so as to exempt it from the State's zoning regulations. Although the First Circuit noted, as an introduction to its Indian country analysis, that the "Indian country label bears real significance" with respect to the State's authority to regulate, the case did not involve a preemption analysis, and the Court cited neither *White*

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resort in *Mescalero*. The Tenth Circuit's decision below is thus entirely consistent with *Blunk*.

Mountain Apache nor *Mescalero* in its brief discussion of the significance of Indian country. *Id.* at 914-15. Accordingly, the Court had no occasion to – and did not – address the question presented by petitioner concerning the scope of *White Mountain Apache*'s applicability.

Similarly, the Supreme Court of New Mexico case cited by petitioner, *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation & Revenue*, 759 P.2d 186 (N.M. 1988), creates no conflict with the Tenth Circuit. In that case, the Supreme Court of New Mexico made the uncontroversial observation that the *White Mountain Apache* analysis "does not apply to activities of non-Indians occurring off Indian reservations," in the course of determining that the State was not preempted from taxing an attorney's off-reservation legal services. *Id.* at 187. However, it was undisputed that all of the conduct at issue took place off-reservation, *see id.* at 188, and thus the court had no occasion to assess whether *White Mountain Apache* applies where the core conduct occurs on the reservation, notwithstanding important off-reservation aspects.[7]

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[7] Although there is no conflict with the New Mexico Supreme Court's decision in *Rodey*, the New Mexico *Court of Appeals* subsequently applied *Rodey* in a manner that seems inconsistent with the Tenth Circuit's decision in this case. *See Ramah Navajo School Board, Inc. v. New Mexico Taxation & Revenue Department*, 977 P.2d 1021, 1029 (N.M. Ct. App. 1999). The *Ramah* decision provides no basis for a grant of certiorari, however, as it is not a decision of a "state court of last resort." S. Ct. R. 10. Moreover, even in *Ramah*, the court of appeals *invalidated* the fuel tax at issue, applying a broad reading of express preemption and invalidating the tax in large part because of its connection to on-reservation projects. 977 P.2d at 1032-34. Thus, although purporting to apply the stricter *Mescalero* standard, the New Mexico Court of Appeals reached the same result as the Tenth Circuit did here, relying on many of the same factors that the Tenth Circuit found relevant.

3. The Tenth Circuit's approach (like that of the Ninth Circuit and other courts discussed above) also conforms with this Court's precedent. Even after *Mescalero*, this Court has not required express preemption in all cases that have off-reservation aspects. For example, in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), the Court rejected the State's claim that the case be treated as an off-reservation case, simply because the non-Indian trader whom the State sought to tax "did not maintain a permanent place of business on the reservation." *Id.* at 165. Rather, despite the off-reservation nature of the trader's business, the Court treated the case as on-reservation, because the core conduct at issue was the trader's sale of goods to on-reservation Indians. *Id.*

Similarly, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), the Court applied the *White Mountain Apache* analysis to a gross receipts tax imposed on a non-Indian that did business throughout the State, recognizing that a balancing test was appropriate at least insofar as the tax applied to construction projects on the reservation. *Id.* at 837-39. Indeed, the Court did so despite the express contention that the case was distinguishable from *White Mountain Apache* because the contractor in *White Mountain Apache* "conducted no off-reservation activities whatsoever," while "[t]he contractor in this case is a general building contractor doing business throughout the State of New Mexico, and enjoying state services to the same extent as any other commercial enterprise in New Mexico." *Id.* at 852 n.3 (Rehnquist, then-

J., dissenting). In short, the Court's precedent simply does not support the extreme rule suggested by petitioner – that some off-reservation activity, regardless of otherwise substantial on-reservation activity – precludes application of *White Mountain Apache*. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) (treating challenge to state motor vehicle tax as on-reservation case, despite the fact that tribal members living on allotments "likely use their cars more frequently on state land and less frequently within Indian country than tribal members who live on established reservations").

Like the Tenth Circuit, this Court has recognized the need for careful analysis where state regulation impacts tribes' long-recognized right to self-government and federal policies encouraging Indian economic development. *See, e.g.*, *Cabazon*, 480 U.S. at 215 n.17 (1987) ("We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak"). In particular, this Court has disallowed States from avoiding preemption by labeling as off-reservation activity what is truly on-reservation activity. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac and Fox*, 508 U.S. at 127-28 ("Oklahoma may not avoid our precedent by avoiding the name 'personal property tax' here any more than Washington could in *Colville*"); *Central Machinery*, 448 U.S. at 164 n.3 (explaining that "regardless of the label placed on this tax, its imposition as to on-reservation sales to Indians could" undermine federal policy). Accordingly, applying *White Mountain Apache* in this case is entirely consistent with this Court's precedent.

4. Petitioners' remaining efforts to manufacture a relevant split of authority fare no better. Petitioner suggests, for example, that the Tenth Circuit has effectively held that

whenever a tax imposes an "indirect economic effect" on a Tribe it is "void," Pet. at 14-15, and that the imposition of a "transient economic burden" on a Tribe is "sufficient to preempt the State tax," *id.* at 17. To the contrary, that is the precise position that the Tenth Circuit *rejected*. Citing its previous decision in *Sac and Fox*, the Tenth Circuit stated that it "would *not* invalidate a tax solely on the ground that it would decrease tribal sales to non-Indians." Pet. App. 8a (emphasis added). Indeed, *Sac and Fox* makes that crystal clear, because there, the Tenth Circuit *rejected* the Tribes' argument that the reduction in tribal revenues from the imposition of the tax was sufficient to overcome the State's interests. *See* 213 F.3d at 584-85.

Petitioner and its *amicus* also fire off an array of policy arguments for why the Tenth Circuit was wrong to "expand[] *White Mountain Apache* to the present context." Pet. at 8-9. As explained above, however, the Tenth Circuit's decision and decisions like it are not an expansion of *White Mountain Apache*, but an application of that case and other precedent of this Court. Indeed, petitioner's policy arguments have nothing to do with this particular case, but rather are part of petitioner's meritless broadside on *White Mountain Apache*. *Infra* at 22-24.

Contrary to petitioner's speculation, there is simply no reason to believe that courts will begin applying *White Mountain Apache* to any and all upstream suppliers of products to Indians. Rather it is only where the particular tax is effectively consummated upon reservation delivery and is integrally related to and burdens on-reservation Tribal activity that the *White Mountain Apache* analysis applies. Indeed, the motor fuel tax at issue here is *unlike* most taxes on upstream suppliers. *First*, state motor fuel taxes are unique because they are generally collected for the sole

purpose of maintaining the roads and not for raising general revenue, *see* Kan. Stat. Ann. § 79-3402, and thus where, as here, the fuel is distributed on-reservation for on-reservation sale, the asserted state interest in taxation is weaker. The same may not be true, of course, of a tax that raises general fund revenues. *Second*, and related, under the Kansas statute at issue, whether the distributor must pay the motor fuel tax depends entirely on the ultimate destination of the fuel. *See* Kan. Stat. Ann. § 79-3408(d). Accordingly, the on-reservation destination of the fuel in this case is critical to determining whether the tax applies. Indeed, the tax design at issue here – which reflects that motor fuel taxes are generally targeted toward in-state consumption – is distinguishable from other taxes that apply to off-reservation upstream suppliers.

If anything, policy arguments based on the facts of this case counsel strongly in favor of the Tenth Circuit's decision. A basic purpose of the "Indian preemption" jurisprudence is to protect value generated on Indian reservations from undue infringement by States.[8] Here, as found by the courts below, Kansas seeks to tax commerce in "fuel which, under the particular circumstances of this case, is derived primarily from value generated on the

[8] *See, e.g.*, *Cabazon*, 480 U.S. at 219 ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) (preempting a state law where the state regulation "would also threaten Congress' overriding objective of encouraging tribal self-government and economic development," by interfering with activities "generat[ing] funds for essential tribal services and provid[ing] employment for members who reside on the reservation").

reservation." Pet. App. 13a. Further, the Nation uses the fuel tax from the Nation Station – "the Nation's only source of fuel revenue" – exclusively for the upkeep of reservation roads for which "Kansas does not provide any financial assistance." *Id.* Nonetheless, Kansas has gone out of its way to attempt to evade preemption by shifting its tax to the fuel distributors, knowing that this tax would be passed on to the Nation, burden its on-reservation enterprise, and preclude the Nation from obtaining vital fuel tax revenues. What Kansas seeks to do is directly analogous to the Indian conduct *disallowed* in *Colville*, in which the Court prohibited the tribe from "marketing" its tax exemption – that is, collecting taxes that otherwise would have been collected by the State, without providing any Indian-generated value. *Colville*, 447 U.S. at 155. Similarly here, Kansas seeks to burden revenues from what is principally on-reservation activity without providing any corresponding value to the burdened activity. Pet. App. 13a-14a.[9]

[9] The State is wrong to suggest that the Tenth Circuit's decision deprives the State of money that it is due for maintaining the roads. Pet. at 8-9. Although some Nation Station customers consume fuel off-reservation, many casino patrons and others who use reservation roads buy no fuel at the Nation Station and pay no tribal fuel taxes. Moreover, purchases at the Nation Station for off-reservation use are clearly not disproportional to those for on-reservation use because its customers are not drawn to the Station to buy cheap gas. Indeed, it is likely that the state's fuel tax revenues have increased independent of the Nation Station because of the market created by the Tribe's casino, which has generated more fuel purchases by Kansas residents who would otherwise stay home and out-of-state residents who would otherwise not travel to Kansas.

Accordingly, Kansas' plea to resolve the "conflict" allegedly implicated by the decision below is meritless.

5. Petitioner's fallback ground for *certiorari* is a request that this Court overrule *White Mountain Apache* in *all* situations, eliminating the balancing test in order to give States "predictability" in the implementation of their tax statutes. Pet. at 10-20. There is, however, no justification for granting petitioner's radical request.

Petitioner and its *amicus*, of course, do not allege a conflict among lower courts on this question. They rely instead on exaggerated and unsubstantiated claims about the practical consequences of *White Mountain Apache*. For instance, petitioner suggests that state fiscs are jeopardized – indeed, thrown into "chaos," Pet. at 18 – by the allegedly unpredictable applications of *White Mountain Apache*. Rhetoric aside, there is simply no basis for these claims. The fuel tax revenues that the State seeks to collect here on deliveries to the Nation Station – the *sole* source of the Tribe's tribal fuel tax revenue – constituted a scant 0.09% of the motor fuel taxes collected by Kansas in 1999, and an even more trivial percentage of the State's overall tax revenues. Brief for Appellant at 16 (10th Cir. filed Sept. 22, 2003). There is no reason to believe that the future of Kansas' revenue collection – or that of other States – is jeopardized by the existence of *White Mountain Apache*. Rather, where (as here) the tribal revenue is dedicated to tribal government services for the reservation, the State obtains *benefits* by having these needs met by the Tribe.

As for predictability, courts – including this Court – have refined the *White Mountain Apache* framework and applied it to specific factual situations without a problem. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32,

36-37 (1999) (summarizing this Court's use of the *White Mountain Apache* framework); *Chickasaw*, 515 U.S. at 459 (endorsing and describing the balancing inquiry); *Ramah*, 458 U.S. at 846 (refusing to discard *White Mountain Apache* and explaining that "our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts"). If anything, it is because States continually devise new mechanisms for imposing taxes that affect Indians to avoid preemption – and not because of any feature of *White Mountain Apache* – that there has been litigation about that case's meaning. *Supra* at 21. Challenges by taxpayers are a inevitable part of any tax system, and the State offers no reason to think that challenges by Indians raise particular concerns.

Moreover, to the extent that practical concerns are truly at issue, it is noteworthy that other States have entered into compacts with Tribes to resolve issues of taxation like those presented here. *See, e.g.*, Richard J. Ansson, Jr., *State Taxation of Non-Indians [Who] Do Business With Indian Tribes*, 78 Or. L. Rev. 501, 545-49 (1999); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 nn.36, 37 (1999). States also have enacted state tax credits for tribal taxes. *See, e.g.*, N.M. Stat. Ann. § 7-13-4.4 (New Mexico state tax credit for tribal fuel taxes); Nev. Rev. Stat. § 370.503 (Nevada state tax credit for tribal cigarette taxes); Ariz. Rev. Stat. § 42-3302 (Arizona state tax credit for tribal cigarette taxes). Where, as here, a State refuses to avail itself of such measures to coordinate its tax collection efforts with those of Indian tribes, but rather seeks to find creative ways that burden tribal value, any resulting uncertainty is no basis for reworking existing law.

Practical considerations aside, petitioner's proposal is fundamentally misguided. The balancing test articulated in *White Mountain Apache* was not created out of whole cloth. That test is merely an expression of how courts should account for all of the federal, state, and tribal interests, including the Indian interests – and sovereignty – long recognized by this Court as relevant to Indian preemption analysis. *White Mountain Apache*, 448 U.S. at 141 (articulating and discussing the "several basic principles with respect to boundaries between state regulatory authority and tribal self-government" established by the Court's precedent from the Nineteenth Century forward); *id.* at 144-45 (citing cases exemplifying the Court's historical practice of case-specific assessment of Indian preemption claims); *see also, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (endorsing *White Mountain Apache* as embodying "a flexible pre-emption analysis sensitive to the particular facts and legislation involved"); *Ramah*, 458 U.S. at 846 (balancing "allow[s] for more flexible consideration of the federal, state, and tribal interests at issue"). In contrast, a rule limiting Indian tax immunity to cases of express preemption gives no outlet for consideration of those interests. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("*New Mexico v. Mescalero*") (explaining that the Court has expressly "rejected a narrow focus on congressional intent to preempt State law as the sole touchstone," based on the "'unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination" (quoting *White Mountain Apache*, 448 U.S. at 143)). Thus, the Court should decline petitioner's request to abandon the context-sensitive analysis that is so clearly appropriate in this area.[10]

[10] Petitioner cites cases in support of the undeniable proposition that in a particular case, a number of different factors may properly affect the balance. *See* Pet. at 11-14. But it is precisely that context-specific approach that allows courts to accommodate all of the various interests at stake. Such accommodation of all relevant interests is, as this Court has explained, not a vice but a virtue.

6. Finally, petitioner asks this Court to review the Tenth Circuit's case-specific assessment under *White Mountain Apache*. Pet. at 20-24. This plea for error correction is plainly an insufficient basis for this Court's review.[11]

Moreover, there is no reason for this Court to disturb the Tenth Circuit's reasonable application of *White Mountain Apache*, *Colville*, and related precedent to the facts of this case. The Tenth Circuit carefully explained, for example, why this case is unlike *Colville*, in which this Court permitted state taxation of smokeshops on tribal land that sold cigarettes free of state taxes at below-market prices, and that thus drew state residents who would otherwise shop elsewhere. *Colville*, 447 U.S. at 155. In contrast, the Nation Station sells fuel at market prices and thus undisputedly does not "market" a state tax exemption, as in *Colville*. Pet. App. 4a. Rather, the Nation Station's customers are generated by the casino and other on-reservation values. Thus, there is simply no worry – as there was in *Colville* – that state residents will venture to the Tribe's rural and remote reservation only to make purchases that they would otherwise make in Kansas.

The Tenth Circuit also properly noted that the "unique facts" here were similar to those in *Cabazon*, where this

[11] Although petitioner claims that the Tenth Circuit's balancing was "in sharp contrast to decisions from other circuits," Pet. at 20, petitioner does not substantiate this claim, *see id.* at 20-24.

Court preempted certain state regulations that impermissibly sought to regulate value generated on the reservation. Pet. App. 7a. The Court emphasized that the Tribes had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." *Cabazon*, 480 U.S. at 219. As the Tenth Circuit explained, the Nation Station functions as a vital part of the Tribe's self-generated casino operation, Pet. App. 8a-9a, and "[a]s in *Cabazon*, the Nation built a modern casino and ancillary services, like the Nation Station, in order to offer its patrons an attractive entertainment opportunity," *id.* at 10a-11a.

The Tenth Circuit also carefully explained why the Tribe's interests predominate here. The Tribe's sole source of fuel tax revenue is the Nation Station, and it is bound to use – and has in fact used – that revenue to build, improve, and maintain on-reservation roads, including those leading to the casino. Pet. App. 11a-13a. In contrast, the State does not help maintain critical on-reservation roads, but rather claims an interest in taxing the Nation Station based on its maintenance of off-reservation roads. *Id.* at 13a-14a. *See New Mexico v. Mescalero*, 462 U.S. at 336 ("[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity")

Moreover, the balancing required by this Court's cases takes place against the backdrop of Congress' "'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216. The Nation Station is an integral part of the Tribe's federally regulated

casino enterprise, which Congress has endorsed "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see id.* § 2701(4) (stating that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"). As in *Cabazon*, the casino and resulting Nation Station provide "revenues for the operation of the tribal governments and the provision of tribal services," and are a "major sourc[e] of employment on the reservatio[n]." 480 U.S. at 218-19. "Self-determination and economic development are not within reach if the Tribe[] cannot raise revenues and provide employment for [its] members." *Id.* at 219.

Nor, finally, is there any reason to believe that the Tenth Circuit systematically undervalues the interests of the State. Except in the "unique" case (like this one) in which the State is burdening tribally generated on-reservation value, the Tenth Circuit has *preserved* the Kansas motor fuel tax, even as applied to fuel distributed to tribal retailers. *Compare Sac and Fox*, 213 F.3d at 584-85 (no preemption where it appeared that "the revenues resulting from the Tribes' retail fuel sales to non-Indian customers traveling from outside Indian lands is not derived from value 'generated on the reservations'" (quoting *Colville*, 447 U.S. at 155)), *with* Pet. App. 8a-9a (explaining that "unlike in *Sac and Fox*, the Nation's fuel market does not exist because of a claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities"). There is simply no reason to believe that the Tenth Circuit routinely applies *White Mountain Apache* too generously. The Tenth Circuit's fact-bound application of the *White Mountain Apache* balancing test thus does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 4, 5

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) 2, 9, 10

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 10

Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996) 10

Negonsott v. Samuels, 507 U.S. 99 (1993) 8

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) ..... *passim*

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 5, 7

Sac and Fox v. Pierce, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) 1, 5

United States v. New Mexico, 455 U.S. 720 (1982) 8

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) 1

STATUTES AND RULES

18 U.S.C. § 3243 8

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) 9

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) 1, 2

REPLY BRIEF FOR PETITIONER

Respondent Prairie Band Potawatomi Nation's opposition to the certiorari petition rests principally on three propositions: (1) the balance-of-interests standard in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1981), applies because the Kansas fuel tax "is effectively consummated upon reservation delivery and is integrally related to and burdens on-reservation Tribal activity" (Opp'n 19); (2) no need exists to reconsider *White Mountain Apache* because "courts – including this Court – have refined the [decision's] analytical framework and applied it to specific factual situations without a problem" (Opp'n 22); and, (3) the court of appeals properly applied the *White Mountain Apache* standard because "[e]xcept in the 'unique' case (like this one) in which the State is burdening tribally generated on-reservation value, the Tenth Circuit has preserved the Kansas motor fuel tax, even as applied to fuel distributed to tribal retailers" (Opp'n 27) (citing *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001)). None of these propositions is correct.

First, Respondent ignores the fundamental fact that the taxable event under Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) is the *receipt* of motor fuel by the distributor. The limited exceptions to the tax liability – *e.g.*, motor fuel sold to the United States – have no application here, and do not alter the point at which the distributor, manufacturer or distributor incurs tax liability. *Second*, the suggestion that application of the *White Mountain Apache* balancing test has proved unproblematic in a taxation context cannot be squared either with the two Tenth Circuit decisions addressing fuel taxes, the opinion below and *Sac and Fox*, or with the most recent Ninth Circuit decision concerning state authority to tax non-tribal entities doing business with tribes on reservation, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1996). *Last*, Respondent's claim that state tax authority is limited to situations where a tribal retailer simply "markets" an exemption from a state tax, and that preemption of off-reservation state tax is proper merely because

customers are drawn to the station by Respondent's casino, ignores *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

ARGUMENT

1. Remarkably, Respondent neither refutes, nor directly addresses the State's first question presented in its petition. The State has asked this Court to consider whether, the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, applies when a State taxes the *receipt* of fuel by distributors, and such receipt occurs off-reservation, simply because the fuel is later sold by a tribe to final consumers?

Respondent does not contradict the State's position that balancing under *White Mountain Apache* is improper when a State taxes or regulates off-reservation transactions. Instead, Respondent creates the straw man argument that the Kansas fuel tax is actually triggered by Respondent's use of the fuel for on-reservation sales (Opp'n 12).

However, Respondent mischaracterizes the "non-Indian conduct at issue" as the "distribution of fuel" for on-reservation sales, since the relevant conduct for tax purposes is the fuel's *receipt* off-reservation. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) thus provides in relevant part that, "the incidence of this tax is imposed on the distributor of the first *receipt* of the motor fuel." That such fuel may be marketed subsequently to an Indian tribe for retailing on or off-reservation is immaterial to State tax liability, because the legal obligation to pay the tax accrued upon receipt upstream, off-reservation. Respondent's re-characterization of the tax as "overwhelmingly concern[ing] on-reservation activity" is palpably inaccurate.

Notably, Respondent barely refers to this Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). This is understandable given the fact that the Circuit opinion below effectively eviscerates, *sub silentio*, the holdings of *Chickasaw Nation*. It is impossible to harmonize the Circuit decision with *Chickasaw Nation*, which held, "[i]f a State is unable to enforce a tax because

the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Here, there is no question that Kansas is not taxing Respondent. Rather, the Circuit held that Kansas' fuel tax, imposed in a manner completely in harmony with and authorized by the holding of *Chickasaw Nation*, is, nevertheless improper because it interferes with the fact intensive, "unique" and "narrow" economic realities of Respondent's fuel sales.[1]

Further, aside from trying rewrite the Kansas fuel tax scheme itself, Respondent also fails to acknowledge forthrightly the unmistakable relevance of this Court's second holding in *Chickasaw Nation*. Two taxes were at stake in *Chickasaw Nation*: Oklahoma's fuel tax with respect to Indian country sales, and its tax imposed on income earned by tribal members who worked on tribal lands for the tribe but resided outside Indian country. The tribe argued that "Indians and Indian tribes are generally immune from state taxation." *Id.* at 464. The Court was not persuaded because "this principle does not apply

[1] Curiously, Respondent here and the Circuit decision below takes the position espoused by the state in *Chickasaw Nation* that incidence of tax should give way to economic realities, a position this Court readily swept aside. "The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax." *Chickasaw Nation*, 515 U.S. 450, 458. "But our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make "economic reality" our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product. *Cf. Yakima*, 502 U.S., at 267-268, 112 S.Ct., at 692- 693 (categorical approach safeguards against risk of litigation that could "engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). *Id.* at 459-60. "A 'legal incidence' test, as 11 States with large Indian populations have informed us, 'provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Id.* at 460.

outside Indian country." *Id.* Key to its determination was a prior conclusion with respect to where the taxable event took place, "That the receipt of income by a resident of the territory of a taxing sovereign is a taxable event is universally recognized. Domicil itself affords a basis for such taxation." *Id.* at 463 (quoting *New York ex rel., Cohn v. Graves*, 300 U.S. 308, 312 (1937)). *Chickasaw Nation* stands for the proposition that a court must honor what the state legislature has identified as the "taxable event."

This general rule, moreover, was unaffected by the States' discretion to exempt from such taxation "income earned outside their borders," since "'[i]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations.'" *Id.* at 463 n.12. *Chickasaw Nation* additionally stands for the proposition that merely because a State may provide exemptions or deductions from a tax does not alter the legal incidence of the tax. There is a difference in the tax world between statutes imposing taxes and statutes granting exemptions or deductions from taxes. Respondent's opposition improperly blurs them into one.

Respondent's rhetorical sleight-of-hand – contending that "the on-reservation distribution of the fuel in this case is critical to determining whether the tax applies" (Opp'n 20) – cannot obscure the fact that such event occurs off-reservation when the distributor first receives fuel. State authority in this respect parallels and complements the earlier conclusion in *Chickasaw Nation* that the legislature may allocate legal incidence; *i.e.* the legislature has discretion to decide not only who constitutes the taxpayer but also when the obligation to pay the tax accrues.[2]

Respondent's reliance on *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), and

[2] A legislature's designation of the legal incidence of a State tax is also presented by the petition for *writ of certiorari* in *Hammond v. Couer d'Alene Tribe*, No. 04-624, filed simultaneously with this writ.

Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982), for a contrary rule, misses the mark widely.

These two cases considered the validity of a State's taxing proceeds received from a tribe for, in *Central Machinery*, the sale of tractors *on* reservation (448 U.S. at 161 n.1) and, in *Ramah Navajo*, for the construction of an *on*-reservation tribal school (458 U.S. at 836). In these decisions the States unmistakably imposed tax on on-reservation transactions and relationships. Respondent appears to argue that each of these cases had some off-reservation aspects to support its reliance on their citation. It is clear, however, that the activity the States sought to tax in these cases occurred *on* reservation. The situation here differs dramatically because the State tax is imposed on an activity that occurs entirely off-reservation prior to any subsequent delivery.

Despite Respondent's protestations to the contrary, and its attempts to re-characterize the taxable event as being "delivery and distribution on reservation," all of the state statutes and the legally relevant element of the state tax at issue here (receipt by the distributor) occur off-reservation and upstream from Respondent.[3] Thus, the question still stands: whether, when a State taxes the off-reservation receipt of fuel by non-tribal distributors, manufacturers and importers, and such receipt occurs off-reservation, the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, applies because the fuel is later sold by a tribe to final consumers?

2. Respondent offers little more than *ipse dixit* justification for maintaining the *White Mountain Apache* balance-of-interests test in the field of state regulation that this Court has recognized requires certainty of legal

[3] Naturally, Respondent does not want to address (and the Circuit's decision ignored) the final "link" of the fuel tax commerce chain, *i.e.* where is the fuel ultimately used? Respondent claims ultimate use is for on-reservation sales. (Opp'n 12) As the panel in *Sac and Fox* and the district court in this case unmistakably determined, the vast volume of the fuel purchased by retail customers is ultimately used on State roads and bridges.

authority. *Chickasaw Nation*, 515 U.S. at 460. The proffered justification – that the current balancing test has been applied "without a problem" (Opp'n 22) and that confusion arises, "[i]f anything, . . . because States continually devise new mechanisms for imposing taxes that affect Indians to avoid preemption" (Opp'n 23) – is simply not credible. Moreover, Respondent's reiteration in its opposition about myriad "unique" and "narrow" facts, and the laundry list of its economic situation simply begs the question as to whether balancing is viable.[4]

The difficulty in lower federal courts' application of *White Mountain Apache* where state taxes are challenged, and the attendant lack of predictability, cannot be fairly denied given both the decision below and the very case, *Sac and Fox*, that Respondent relies upon for its claim that, except in "unique" circumstances, "the Tenth Circuit has *preserved* the Kansas fuel tax, even as applied to fuel distributed to tribal retailers." (Opp'n 27). Here, as an illustration, the court of appeals relied upon the concept of "reservation value added" to invalidate the Kansas tax – a concept aimed at capturing the notion that most fuel purchasers at the tribal convenience store were drawn to the reservation by the casino. The elastic nature of that notion hardly needs detailed elaboration. Under the Circuit's approach, States likely will be required either to adduce or

[4] Two simple examples from the Circuit decision point to the inherent flaw of balancing: 1) The Circuit found that Respondent's fuel price is within two cents of market. Pet. App. 9-10. But what if it was four cents, six cents, eight cents, a dime below market? Now does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? 2) Respondent's fuel station was adjacent to Respondent's casino. Pet. App. 3. What if Respondent's fuel station was a quarter of a mile from its casino, a half-mile, one mile, two? How close does it have to be? When is it far enough away that it no longer "draws value" from a tribal casino? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? What about other tribal businesses? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

rebut evidence related to, among other things, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each permutation's "uniqueness" in order to "balance" are, literally, endless and unknowable for viable predictability of tax administration. Respondent is tellingly silent on the necessary implications of the interest balancing they portray as predictable.

The potential complexity in applying the *White Mountain Apache* standard is illustrated graphically in the State's Petition by the multi-factor "weighing" process in *Yavapai-Prescott*. There, the Ninth Circuit panel majority identified over 20 factual considerations that had been deemed relevant to the interest-balancing analysis in two prior circuit decisions and distilled, under the evidence before it, eight factors that favored preemption and six factors militated against preemption. *Id.* at 1109-12. It is not surprising that the panel's third member – examining the same facts – came to a different conclusion after engaging in his own assessment of the competing federal, state and federal interests. *Id.* at 1113 (Pregerson, J., dissenting).

Respondent's suggestion that States have precipitated any difficulty in applying *White Mountain Apache* by "devis[ing] new mechanisms for imposing taxes that affect Indians to avoid preemption" is cut from whole cloth. The Kansas statute simply imposes legal incidence upon the distributor's receipt of fuel off-reservation as authorized by this Court in *Chickasaw Nation*. 515 U.S. at 460. The Kansas fuel tax, in short, is not some form of devious or convoluted effort to sidestep the Court's precedent; it is instead a mainstream approach to the task of taxing motor fuel efficiently and comprehensively.

Finally, then-Justice Rehnquist, joined by two other members of this Court, dissented from the judgment in *Ramah Navajo* and remarked on the anomaly of "accord[ing] an Indian tribe, whose sovereignty 'exists only at the sufferance of Congress and is subject to complete

defeasance,' . . . greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent." 458 U.S. at 856-57. This anomaly was compounded by the issuance "[a] short three months ago" of the decision in *United States v. New Mexico*, 455 U.S. 720 (1982), that upheld application of the same tax to federal contractors. 458 U.S. at 855 (Rehnquist, J., dissenting). The *New Mexico* rule, which assigns controlling weight to legal incidence, has shown itself capable of relative ease in application over the broad range of state taxation and adequately protects federal interests no less compelling than those here. The Court should adopt a preemption analysis based on the principle that Indian immunities are dependant upon congressional intent, and abandon the balance-of-interests standard that, aside from apparent doctrinal anomaly, introduces substantial uncertainty over the scope of state tax authority.

3. Respondent defends the court of appeals' application of the *White Mountain Apache* interest-balancing standards largely on the ground that "the Nation Station's customers are generated by the casino and other on-reservation values" and that "the State does not help maintain critical on-reservation roads." (Opp'n 25-26) The second of these contentions is unsupported by the record. Kansas built and maintains U.S. Highway 75, which runs through Respondent's reservation and over which access to the casino is gained from outside the reservation, and as to which Kansas enforces state motor vehicle law against both Indians and non-Indians. 18 U.S.C. § 3243. *See Negonsott v. Samuels*, 507 U.S. 99, 105-06 (1993).

Moreover, Respondent's massaging of the facts belies the record. Respondent's opposition leaves the impression that the State does nothing for roads and bridges on the reservation. In its Appendix Vol. III before the Circuit at page 134 Respondent stated: "The Nation's Road and Bridge Department . . . currently has responsibility for 118 miles of the 212 miles of roads on the reservation." The State of Kansas and its political subdivisions maintain the balance (approximately 45%) of reservation roads. Funding for these state road services comes in large part from the

state fuel taxes at issue here. The distributor, Respondent, Respondent's members, and Respondent's casino and fuel patrons enjoy the benefits of these significant on-reservation road services, as well as the entire State road system. Indeed, the absence of this integrated road system infrastructure provided by the State would make the existence of Respondent's casino and fuel station a practical impossibility. Respondent's phraseology disingenuously implies that the State provides no such infrastructure. The uncontroverted facts below showed precisely the opposite.

There is no legitimate dispute that Kansas provides the highway physical and regulatory infrastructure both on and off-reservation that enables fuel and fuel users to access the casino. This is not, in other words, "a case in which the State has nothing to do with the [alleged] on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186.

Accordingly, the Circuit's preemption determination is reduced to the conclusion that Respondent provides added reservation value. The basis for its conclusion is that the tribal casino provides the customer base for the Nation Station.

First, it needs to be stressed that the Kansas fuel tax is not "directed at fuel which . . . is derived primarily from value generated on the reservation." Pet. App. 13. There are no facts in the record that the fuel is "derived" on the Respondent's reservation, and the Kansas tax is not based on value, but rather it is based on volume of receipt by distributors, importers and manufacturers, which in this case occurs off-reservation. *E.g.*, Kan. Stat. Ann. 79-3408(a) (Supp. 2003) ("A tax *per gallon* or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed. . . .").

Nevertheless, this Court has removed any doubt in *Cotton Petroleum* that the mere presence of "reservation value added" is not sufficient to preempt a state tax whose legal incidence is borne by a nonmember. The presence of such value was undisputed there, since the involved state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a

lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What was instead dispositive was the fact that the State provided "'substantial services'" to the tribe and the mineral lessee (*id.* at 1850). These same principles apply where an excise or other type of state taxation is in question. *See, e.g., Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (stamped cigarette allocation scheme); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (transaction privilege tax). The decision below applying *White Mountain Apache* cannot be reconciled with *Cotton Petroleum*.

CONCLUSION

For the foregoing reasons, and for those in the Petition, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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No. 04-631

In The
Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 4

I. THIS COURT HAS UNIFORMLY AND EXPRESSLY LIMITED THE SPECIAL INDIAN IMPLIED PREEMPTION BALANCING TEST TO RESERVATION ACTIVITIES 4

A. Cases developing the preemption-by-implication analysis rest on historical notions of tribal sovereignty and thus limit the doctrine to reservation activity 4

B. Every other case applying the special implied-preemption test has likewise concerned on-reservation activity 10

II. THE COURT HAS EMBRACED A BRIGHT-LINE "LEGAL INCIDENCE" TEST TO DETERMINE ON WHICH PARTY AND WHAT TRANSACTION A STATE IMPOSES TAX 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 11

Carpenter v. Shaw, 280 U.S. 363 (1930) 6

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1982) 9

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) 11

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., 512 U.S. 61 (1994). 11

Hicks v. Miranda, 422 U.S. 322 (1973) 12

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 2, 5, 6, 7

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 3, 4, 5, 7, 8, 9, 12, 15, 16

Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) 11

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 11

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 13, 14, 15, 16

Oklahoma Tax Commission v. Citizens Band of Potawatomi Tribe of Okla., 498 U.S. 505 (1991) 11

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1938) 4, 7

Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979 (10th Cir 2004) 14, 15

Ramah Navajo School Board Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 9, 10

Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division, 759 P.2d 186 (N.M. 1988) *appeal dismissed* 490 U.S. 1043 (1989) 12

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 2

Trotter v. Tennessee, 290 U.S. 354 (1933) 4

United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 1

United States Trust Co. v. Helvering, 307 U.S. 57 (1938) 4

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 5, 9

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980). 11, 13

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 8, 9, 10, 16

Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 2

Statutes and Legislative Material:

KAN. STAT. ANN. § 79-2401(p) 14

KAN. STAT. ANN. § 79-2408(c) 14

MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001) 1, 2

TITLE II of PUB. L. No. 86-272, 73 STAT. 555, 556 (1959) 2

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three states are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax sys-

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

tems that followed recommendations of the Willis Committee.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing authority—an essential governmental power for States to fulfill their constitutional role—from federal encroachment.

Preserving state taxing sovereignty under our vibrant federalism remains a key purpose of the Commission today. When States seek to tax transactions on Indian lands, tribes are a third concentric sovereign whose interests must properly be considered. Sorting out which sovereign has authority to impose tax on what transactions inevitably requires line drawing. The brighter the lines, the more administrable the tax, the fewer the conflicts and the lower the compliance burden on taxpayers and tax agencies.

The territorial component of sovereignty has been a key factor in forging bright-line rules. For over 170 years, the Court has imposed a bright-line standard that States have no jurisdiction over Indians on their sovereign lands unless Congress expressly authorizes it.[4] With regard to off-reservation transactions, the Court has likewise relied on a clear demarcation—that tribal sovereignty ends at

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[3] The Willis Committee, a congressional study of state taxation of interstate commerce sanctioned by TITLE II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce.

[4] *E.g. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-69 (1973); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

the reservation boundary. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

State attempts to tax non-Indians for transactions with Indians on tribal reservations raise more difficult issues. The non-Indian taxpayer is within the State and under state authority. Yet the transactions are with Indians on tribal lands, and therefore implicate tribal sovereignty. With sensitivity to both sovereigns, the Court, employing a unique implied-preemption standard, has developed a complex and nuanced balancing test to determine whether States may impose tax in these cases. The test calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In the instant case, Kansas sought to impose fuel tax on non-Indian distributors for receiving gasoline off the reservation. The bright-line rule from *Mescalero Apache Tribe* should have controlled. The Tenth Circuit's erroneous use of the uncertain balancing test of *White Mountain Apache* clouds this bright line and impacts the Commission's interest in protecting state sovereignty in two ways.

First, the Tenth Circuit's holding jeopardizes the unambiguous rule that delineate state authority to tax based on the reservation boundary. Bright-line rules allow good relations to flourish between States and tribes and pretermit disputes and litigation between them.

Second, the holding jeopardizes state authority to tax off-reservation transactions. States depend upon tax revenues to run their governments. Subjecting off-reservation transactions that may subsequently impact Indian tribes to the inexact balancing test will substantially impair States' ability to impose taxes. The decision below deprived Kansas of tax revenue it rightfully expected from a tax imposed on a non-Indian distributor receiving fuel off the reservation merely because the gasoline was later sold to a tribal retailer.

ARGUMENT

I

THIS COURT HAS UNIFORMLY AND EXPRESSLY LIMITED THE SPECIAL INDIAN IMPLIED-PREEMPTION, BALANCING TEST TO RESERVATION ACTIVITIES

A. Cases developing the preemption-by-implication analysis rest on historical notions of tribal sovereignty and thus limit the doctrine to reservation activity.

The crucial necessity for taxing authority for States to fulfill their role as sovereign governments in our federal system has led this Court to sanction preemption of such authority only where Congress expressly so mandates. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1938); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933).

In one special area, however, where States seek to tax activity on tribal reservations and considera-

tions of tribal sovereignty are presented, the Court began development of a doctrine permitting preemption *by implication* in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). The Court held that the federal Indian trader statutes, 25 U.S.C. § 261-262, regulated all aspects of sales of goods to Indians on reservations and therefore preempted *by implication* a state tax imposed on the traders receipts from reservation sales to Indians. Each subsequent case developing the Indian preemption-by-implication analysis made clear that the conceptual basis for this unique exception to express preemption of state tax is inextricably tied to notions of tribal sovereignty on Indian reservations.

In 1973 with *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, the Court first fully articulated the central theoretical basis for the doctrine and the concomitant restriction of its applicability to on-reservation activity. *McClanahan* concerned the imposition of Arizona income tax on reservation income of a Navajo Indian working and residing on the reservation. The Court noted that neither Indian sovereignty nor the federal instrumentality doctrine—previously used by the Court to strike down state regulation or taxation on Indian reservations—blocked the imposition of state tax on the reservation. The modern trend, the Court announced, was toward reliance on federal preemption.

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. [Citation omitted.] The modern cases thus tend to

> avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. [Citations omitted.]
>
> The *Indian sovereignty doctrine* is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it *provides a backdrop against which the applicable treaties and federal statutes must be read.*

McClanahan, 411 U.S. at 172. (Emphasis added.)

The effect of using Indian sovereignty as "a backdrop" against which federal law must be read was to import into the preemption analysis a special rule of interpretation applied to Indian treaties. The rule requires that

> "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."

Id. at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Using this canon of construction, then, the Court found an exemption from Arizona tax *by implication*, relying on federal policy implicit in congressional enactments: "Congress has consistently acted on the assumption that states lacked jurisdiction over Navajos living on the reservation." *McClanahan*, 411 U.S. at 175. This tax exemption by implication, the key feature of this unique Indian preemption standard, derives directly from the effect of tribal sovereignty on the preemption inquiry. Tribal sovereignty is limited to Indian lands.

In the companion case of *Mescalero Apache Tribe v. Jones* concerning off-reservation tribal activity the Court limned the outer limit of the implied-preemption analysis. The Court held that the New Mexico gross receipts tax imposed on receipts of a tribal-operated ski area located *off the reservation* was not preempted in the absence of an explicit federal tax exemption. The Court first cited *McClanahan* for the standard to be applied to "activities carried on within the boundaries of the reservation" and went on to distinguish the preemption standard for state taxation of activities occurring off reservation:

> *Absent express federal law to the contrary*, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.

Mescalero Apache Tribe v. Jones, 411 U.S. at 148-149. (Emphasis added.) In support of the requirement that off reservation Congress must be explicit in providing a tax exemption, the Court quoted *Oklahoma Tax Commission v. United States:*

> "This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . ."

Mescalero Apache Tribe v. Jones, 411 U.S. at 156. Unless Congress expressly forbade it, New Mexico retained the power to tax "Indian activities located or occurring 'outside of an Indian reservation.'" *Id.*, at 149-150. This Court has thus made absolutely clear that in situations involving off-reservation ac-

tivities only an actual conflict with express federal law will preempt the imposition of a state tax, even when the state tax is imposed on Indians.

The Kansas fuel tax at issue in this case was not imposed on the tribe, a tribal entity or tribal member and it was not imposed on a reservation activity. Rather the tax was imposed on a non-Indian distributor when it received fuel in Troy, Kansas, some 60 miles away from the reservation. Thus, the Tribe's claim that courts can imply an exemption from this fuels tax is directly contrary to controlling precedent in *Mescalero Apache Tribe v. Jones*.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court further expanded on the nature and basis of the special implied-preemption analysis in striking down Arizona's imposition of tax on non-Indian logging companies doing business exclusively on the Fort Apache Indian Reservation. The Court emphasized that the preemption law is different when, and because, tribal sovereignty considerations are implicated.

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not states, and the differences in form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other.

White Mountain Apache, 448 U.S. at 143. The Court characterized the implied-preemption analysis as a

balancing test with its "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *Id.* at 145. Significantly, the Court in *White Mountain Apache* reaffirmed the *Mescalero Apache Tribe v. Jones* holding that *off the reservation* an express congressional statement of tax exemption is required:

> In the case of "Indians going beyond reservation boundaries . . . however . . . a nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." *Mescalero Apache Tribe v. Jones, supra*, at 148-149, 92 S.Ct. at 1270.

White Mountain Apache, 448 U.S. at 144, fn. 11.

In a companion case, the Court struck down the Arizona transaction privilege tax when applied to a sale made to an Indian on an Indian reservation. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The Court held that "since the transaction in the present case is governed by the Indian trader statutes, federal law preempts the asserted state tax," *id.* at 165. There is no question that the taxed activity occurred on the reservation as "these [Indian trader] statutes and regulations apply only to activities on reservations." *Warren Trading Post*, 380 U.S. at 690, fn. 14.

The next case to apply the doctrine, *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), struck down the imposition of New Mexico gross receipts tax on receipts of a non-Indian contractor from building a school on the reservation. The Court in *Ramah* relied upon and cited

extensively from *White Mountain Apache*, re-emphasizing the uniqueness of this preemption standard and the central importance of tribal sovereignty.[5]

In each ruling applying this unique standard, the Court found an implication in a statutory scheme that Congress had intended to preempt the state tax on that particular reservation activity. The reservation locus of the taxed transactions in these cases was not fortuitous. Rather, it was central to the underlying conceptual difference between the implied preemption standard applied on reservations and the express preemption standard employed by the Court elsewhere. The very source of the on-reservation standard was the addition of "traditional notions of tribal sovereignty" to the inquiry which represents an additional sovereignty interest to be weighed with state and federal interest.

B. Every other case applying the special implied-preemption test has likewise concerned on-reservation activity.

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[5] The *Ramah* Court held that tribal sovereignty and congressional support thereof "inform the preemption analysis."

> The question whether federal law, which reflects the federal and tribal interests, preempts the State's exercise of its regulatory authority is not controlled by standards of preemption developed in other areas. [Citation omitted.] Instead, *the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis* that governs this inquiry.

Ramah, 458 U.S. at 838. (Emphasis added.)

In all other cases where the Court has used the special implied-preemption, balancing-of-interests test it was always determining States authority over an *on-reservation* activity. The Court authorized States to require tribes to collect and remit state cigarette taxes imposed on non-Indians for on-reservation cigarette purchases in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). It authorized States to require Indian traders selling cigarettes on-reservation to tribal retailers to pre-collect the cigarette tax imposed on the non-Indian customers buying from reservation stores in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 74 (1994). It authorized States to impose severance tax on non-Indians severing oil and gas from reservation lands in *Cotton Petroleum Co. v New Mexico*, 490 U.S. 163 (1989). It barred California from regulating on-reservation tribal gambling offered primarily to non-Indians in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). And it prohibited New Mexico from regulating on-reservation hunting and fishing by non-Indians in conflict with tribal regulations in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In each case, the activity the State sought to tax or regulate occurred on the reservation, justify the invocation of the balancing test, the hallmark of the implied-preemption analysis.

In the only case in which the Court was asked to apply the fully-developed implied-preemption analysis to a state tax imposed on an off-reservation ac-

tivity, it dismissed the appeal for want of a substantial question. *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division*, 759 P.2d 186, 187 (NM 1988) ("The federal preemption by implication doctrine created by the United States Supreme Court to protect Indian interests on the reservation does not apply to activities of non-Indians occurring off Indian reservations."), *appeal dismissed*, 490 U.S 1043 (1989). Dismissal of an appeal constitutes controlling authority. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . .")

State tax imposed on an off-reservation activity will not be preempted absent an express provision of federal statute. *Mescalero Apache Tribe v. Jones* and *Rodey* remain the controlling authorities today. The Tenth Circuit erroneously invoked the special Indian preemption-by-implication analysis in testing the validity of the Kansas fuel tax imposed on the distributor's receipt of gasoline off-reservation.

II

THE COURT HAS EMBRACED A BRIGHT-LINE "LEGAL INCIDENCE" TEST TO DETERMINE ON WHICH PARTY AND WHAT TRANSACTION A STATE IMPOSES TAX.

Prior to selecting the legal standard to test the validity of a State's tax, one must first determine on whom and on what transaction the tax is imposed. With due respect to state sovereignty and administrative predictability, the Court has ruled that this preliminary issue is resolved by the bright line of

where the state has prescribed the legal incidence of tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax.") Whether that person may be taxed for that transaction will then be decided by this Court's settled law with regard to the authority of the respective sovereigns to impose tax. Because the legal incidence of tax in *Chickasaw* was found to be on the reservation sale of gasoline by the tribal retailer, the Court held absent express permission from Congress it was invalid. *Id.*, at 451 ("when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.")

In an attempt to avoid that result, Oklahoma had urged the Court to ignore the legal incidence test and rely instead on the "economic realities" that the ultimate economic burden of the tax was borne by the non-Indian customers, a theory that would then allow use of the balancing test to validate the tax under the holding of *Colville* that States may impose the minimal burden of collection on tribes. The Court rejected that proposal with the comment that

> our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting.

Id. at 459-60. The Court explained the rationale for preferring the legal incidence test over the proffered "economic realities" test.

> By contrast, a "legal incidence" test, as 11 States with large Indian populations have informed us, "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority."

Id. at 460. Finally, the Court bluntly acknowledged that this legal incidence test allows a State to control, in considerable measure, the enforceability of its tax by choosing to place the legal incidence on a party and on a transaction for which settled law sets no bar.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence. So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks "by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Id.*

Kansas has chosen to place the legal incidence of its fuels tax "on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c). Fuel is "received" at a refinery or pipeline terminal when it is loaded into the tank truck of a distributor. Kan. Stat. Ann. § 79-3401(p). The Tenth Circuit affirmed this interpretation of Kansas law. "The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors." *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982

(10th Cir 2004). Thus, applying the legal incidence test of *Chickasaw* to the settled law of *Mescalero Apache Tribe v. Jones* requiring express federal preemption off the reservation would appear to compel affirmance of the Kansas fuel tax on the distributor's receipt of gasoline off reservation.

How, then, did the Tenth Circuit reach a different result? Its logical slip can be isolated in a single sentence where it confounds the issue in *Chickasaw*—whether tax was imposed on the tribal retailer or its non-Indian customer for the same reservation transaction—with the circumstance here—whether tax was imposed on an Indian *for a reservation transaction* or on a non-Indian *for an off-reservation transaction*. First it acknowledged primacy of the legal incidence test. Then it drew the distinction between a tax imposed on the tribal retailer in *Chickasaw* and a tax imposed on the non-Indian here, with the following language.

> "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy . . . ." *Id.*

Powataomi, 379 F.3d at 983. The Tenth Circuit recognized the Indian/non-Indian distinction by acknowledging the legal incidence here rests on the

non-Indian distributor, not the tribe, so congressional authorization was not required. But by referencing the balancing-of-interests, implied-preemption test applicable in *Chickasaw* where the tax was imposed for a reservation transaction on either the tribal retailer or its customer, it ignored the on-reservation/off-reservation distinction. The balancing test is not applicable here, however, where the non-Indian distributor is not being taxed on a reservation transaction but on its receipt of gasoline *off reservation* at the refinery in Troy, Kansas. Ignoring this crucial distinction led the Tenth Circuit erroneously to apply the implied-preemption analysis of *White Mountain Apache* rather than the express preemption requirement of *Mescalero Apache Tribe v. Jones*.

CONCLUSION

Two bright-line rules control this case. The bright line rule of *Chickasaw* determines the enforceability of a tax based upon where the State has chosen to place its legal incidence. The bright-line rule of *Mescalero Apache Tribe v. Jones* holds that with regard to tax imposed on an off-reservation transaction any congressional preemption must be express, not implicit. There is neither factual nor legal dispute that the legal incidence of the tax here is on the distributor for the off-reservation receipt of the gasoline. Nor is there any suggestion that an express provision of federal law bars Kansas from taxing. The decision of the Tenth Circuit must be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as
Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Amended Complaint, pp. 10-21
United States District Court, District of Kansas
Filed February 8, 2000 3

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Plaintiff's Appendix Vol. 1
United States District Court, District of Kansas
Filed December 22, 2000
Potter Affidavit, pp. 70-78 15

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Plaintiff's Appendix Vol. 1
United States District Court, District of Kansas
Filed December 22, 2000
Pflaum Affidavit, pp. 79-89 27

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Plaintiff's Appendix Vol. 2
United States District Court, District of Kansas
Filed December 22, 2000
Conroy Affidavit, pp. 2-4, with attachments 46

TABLE OF CONTENTS – Continued

Page

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Respondent's Appendix Vol. 2
United States District Court, District of Kansas
Filed December 22, 2000
Fender Affidavit, pp. 22-23 66

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Respondent's Appendix Vol. 2
United States District Court, District of Kansas
Filed December 22, 2000
Boursaw Affidavit, pp. 24-31, with attached letter 69

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Respondent's Appendix Vol. 2
United States District Court, District of Kansas
Filed December 22, 2000
Ramirez Affidavit, pp. 134-39 78

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-DES
Response to Motion for Summary Judgment
by Plaintiff
Respondent's Appendix Vol. 2
United States District Court, District of Kansas
Filed December 22, 2000
Map of Prairie Band Potawatomi Reservation
p. 150 84

TABLE OF CONTENTS – Continued

Page

Prairie Band Potawatomi Nation v. Richards
Respondent's Appendix Vol. III Before The
Tenth Circuit
Moulden Affidavit, pp. 161-64 86

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-JAR
Memorandum and Order Granting Summary Judgment
United States District Court, District of Kansas,
January 15, 2003 90

Prairie Band Potawatomi Nation v. Richards,
Case No. 99-4071-JAR
Memorandum and Order on Motion for Reconsideration
United States District Court, District of Kansas,
July 2, 2003 123

Prairie Band Potawatomi Nation v. Richards
Decision of The Tenth Circuit Court of Appeals,
August 11, 2004 131

RELEVANT DOCKET ENTRIES

Prairie Band Potawatomi Nation v. Richards
Complaint by Plaintiff
United States District Court, District of Kansas
Filed May 14, 1999

Prairie Band Potawatomi Nation v. Richards
Amended Complaint by Plaintiff
United States District Court, District of Kansas
Filed February 8, 2000

Prairie Band Potawatomi Nation v. Richards
Answer to Amended Complaint by Defendant
United States District Court, District of Kansas
Filed March 27, 2000

Prairie Band Potawatomi Nation v. Richards
Motion and Memorandum for Summary Judgment by Defendant
United States District Court, District of Kansas
Filed October 16, 2000

Prairie Band Potawatomi Nation v. Richards
Response by Plaintiff Motion for Summary Judgment by Defendant
United States District Court, District of Kansas
Filed December 22, 2000

Prairie Band Potawatomi Nation v. Richards
Reply by Defendant in Support for Summary Judgment by Defendant
United States District Court, District of Kansas
Filed February 1, 2001

Prairie Band Potawatomi Nation v. Richards
Memorandum and Order Granting Summary Judgment by Defendant
United States District Court, District of Kansas
Filed January 16, 2003

Prairie Band Potawatomi Nation v. Richards
Motion and Memorandum to Reconsider And
Alter Judgment by Plaintiff
United States District Court, District of Kansas
Filed January 27, 2003

Prairie Band Potawatomi Nation v. Richards
Response to Motion for Reconsider And Alter Judgment
by Defendant
United States District Court, District of Kansas
Filed February 4, 2003

Prairie Band Potawatomi Nation v. Richards
Reply in Support of Motion to Reconsider And
Alter Judgment by Defendant
United States District Court, District of Kansas
Filed February 12, 2003

Prairie Band Potawatomi Nation v. Richards
Memorandum and Order Denying Plaintiff's Motion
to Reconsider And Alter Judgment
United States District Court, District of Kansas
Filed July 3, 2003

Notice of Appeal as to Judgment on Order on Motion
For Reconsideration, Memorandum & Opinion by Plaintiff
United States District Court, District of Kansas
Filed July 28, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRAIRIE BAND OF POTAWATOMI INDIANS, plaintiff,	)	
vs.	)	Case No. 99-4071-DES
KARLA PIERCE, Secretary of the Kansas Department of Revenue, State of Kansas, in her official capacity, defendant.	)	

AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Feb. 8, 2000)

COMES NOW the plaintiff, Prairie Band of Potawatomi Indians, by and through its legal counsel, and states as follows:

1. The District Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c). The defendant resides in this district, a substantial part of the events or omissions giving rise to the claim occurred in this district, and a substantial part of the property that is the subject of the action is situated in this district.

3. The plaintiff asserts claims arising under the United States Constitution and under federal law, including the Indian Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution, the Kansas Act

for Admission § 1, other federal law and comity. The District Court also has supplemental jurisdiction over any claim deemed a state law claim pursuant to 28 U.S.C. § 1367(a) because any such claims would be so related to the plaintiffs federal claims that they form part of the same case or controversy under Article III of the United States Constitution.

4. A. The plaintiff, Prairie Band of Potawatomi Indians (the "Nation") is a federally-recognized and sovereign Indian Tribe maintaining government-to-government relations with the United States and having a governing body duly recognized by the Secretary of the Interior. See Federal Register: October 23, 1997 (Vol. 62, No. 205). The Nation's 121 square mile reservation near Mayetta, Kansas, is Indian country of the Nation within the meaning of 18 U.S.C. § 1151(a). On its reservation, the Nation has sovereign governmental power, which includes the authority to enact civil laws, including tribal taxation laws. The Potawatomi Nation brings this action on its own behalf, and on behalf of it members, all of which are referred to as the Nation.

B. The Nation has never consented to civil jurisdiction by the State of Kansas over its reservation. The state motor fuel tax laws do not apply to the Nation with respect to motor fuel sold by it on its reservation.

C. The Nation has a federally recognized and supported interest in exercising its powers of sovereign self government, which includes the taxation of motor fuel transactions on its reservation. The Nation has an interest in seeking to prevent the defendant's infringement and impairment of its self government activities through the defendant's adverse actions within or outside

of its reservation with regard to motor fuel sold on its reservation and with regard to the tribal taxation of such motor fuel or the Nation's ability and right to operate a retail motor fuel business.

5. Pursuant to the Indian Gaming Regulatory Act (25 U.S.C. §2701 *et seq.*), the Nation currently owns and operates a casino complex on its reservation on U. S. trust land near Mayetta, Kansas. The Nation also operates a tribally-owned convenience store and gas station (the "Nation Station"), which is located on U.S. trust land on 150th Road between P and Q Road and from which the Nation is making retail sales of motor fuel. Both the casino and the Nation Station are located in Indian Country for purposes of 18 U.S.C. §1151.

6. A. The defendant Karla Pierce is sued in her official capacity. She is charged with the enforcement of the Kansas motor fuel taxation laws that are the subject of this complaint, including K.S.A. 79-3408. Secretary Pierce supervises the entire Kansas Department of Revenue under K.S.A. 75-5101(a).

B. The defendant construes the Kansas motor fuel tax laws to require tax remittance and reporting for all motor fuels sold or delivered to the Nation for retail sale by it on its reservation, and the defendant intends to enforce such laws accordingly against the Nation and/or the persons from whom it obtains motor fuel, including Davies Oil Company. The defendant construes and will attempt to enforce the Kansas tax laws to require the collection of Kansas motor fuel taxes with respect to the motor fuel obtained by the Nation and sold at the Nation Station. Such construction is consistent with her interpretation of the state motor fuel tax laws.

7. A. Under tribal law, the Nation is required to impose and is imposing tribal taxes on retail motor fuel sales at the Nation Station pursuant to PBP Tribal Code §§ 10-6-1 et seq. Under PBP Code § 10-6-7, the tribal motor fuel taxes collected with respect to these motor fuel sales on the reservation are required by tribal law to be used by the Nation for the purpose of constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.

B. Through its Tax Commission, the Nation has the capacity to carry out its interest in self-government through the enforcement of the tribal tax laws in PBP Code Title 10, including tribal motor fuel taxes.

8. The tribal motor fuel tax revenue from the Nation Station and from other sources generates important tax revenue for the Nation's government. Such revenues enable the Nation to provide essential governmental services to its reservation. These tribal governmental services include road and bridge construction and maintenance, law enforcement services, fire protection, environmental protection and zoning services, and social welfare and other government services. The generation of tax and operating revenues from the Nation Station and the provision of tribal government services are the foundation of the self-governance, self-sufficiency and economic development of the Nation and its reservation.

9. A. The defendant's enforcement of the state motor fuel tax laws with respect to fuel obtained by the Nation and sold by it at retail on its reservation has a direct and substantial adverse impact on the Nation. The defendant's enforcement the state motor fuel tax laws with respect to such motor fuel will subject the Nation to the

injury and interference of being only able to obtain motor fuel at a price which makes it difficult or impossible to impose and collect the tribal motor fuel tax and which makes it difficult or impossible to operate the Nation Station on the reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

B. The defendant's actual and threatened imposition or collection of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it on the reservation infringes upon the Nation's sovereign right to impose and collect tribal motor fuel taxes, infringes upon the Nation's sovereign right to finance and provide essential government services for the reservation, infringes upon the Nation's sovereign right to self-government and self-determination and infringes upon the Nation's right to conduct business and to economically develop its reservation.

10. A. The Act for the Admission of Kansas into the Union § 1 provides that nothing contained in the Kansas constitution respecting the state's boundary shall be construed to impair the rights of person or property pertaining to the Nation or its reservation.

B. Prior to, at the time of, and after the enactment of the Act for Admission § 1 through the current date, the Nation has had the fundamental sovereign right to impose tribal taxes on reservation transactions and to engage in commercial business on its reservation.

C. Contrary to the Act for Admission §1, the defendant's actual and threatened imposition or collection of Kansas motor fuel taxes upon the Nation or its

suppliers with respect to motor fuel obtained by the Nation and sold by it on the reservation impairs the Nation's sovereign right to impose and collect tribal motor fuel taxes, impairs the Nation's sovereign right to finance and provide essential government services for the reservation, impairs the Nation's sovereign right to self-government and self-determination and impairs the Nation's right to conduct business and to economically develop its reservation.

D. Under the facts of this case and with respect to the state's motor fuel taxes, the Act for Admission § 1 prohibits the Nation's reservation from being considered within the territorial boundaries of the State of Kansas. Accordingly, motor fuel which is delivered to the Nation's reservation for retail sale by the Nation is exempt from state taxation under K.S.A. 79-3408(d)(1) and the Act for Admission §1.

11. A. The Kansas motor fuel tax laws are unenforceable against the Nation if the state's interest in enforcing its laws is outweighed by the tribal and federal interests involved. Under the facts and law of this case, the federal and tribal interests in imposing the tribal motor fuel taxes and being able to operate the Nation Station outweigh the interest of the State of Kansas in imposing its motor fuel taxes, and there is no federal law to the contrary. The tribal and federal interests in tribal self government support the Nation's taxation of motor fuel sold at the Nation Station without such fuel also being subjected to the destructive effects of state motor fuel taxes. The state interest supports a state exemption for the motor fuel sold on the Nation's reservation. K.S.A. 79-3408(d)(1) already provides an exemption for motor fuel sold or delivered to other states, territories or foreign

nations. The state of Kansas does not impose its motor fuel tax with respect to fuel delivered for retail sale in other states or in Canada or Mexico.

12. The state motor fuel tax laws unduly discriminate against the Nation. They unduly discriminate by extending exemptions to all other jurisdictions and not to the Nation under circumstances where the state tax unlawfully impairs and infringes upon the Nation's rights and the state interest in imposing the tax is outweighed by the federal and tribal interests.

13. On December 17, 1998, the U.S. District Court of Kansas, Judge Dale E. Saffels, issued a Decision by the Court and Memorandum and Order in *Sac and Fox et al. v. LaFaver,* Case No. 95-4152-DES. In the Decision by the Court it was ordered that:

> " . . . the State of Kansas is permanently enjoined from enforcing Kan. Stat. Ann. § 79-3408 and collecting taxes from distributors on the sale of motor vehicle fuel in all transactions involving the federally recognized Indian tribes who are Nations to this action."

In the Memorandum and Order, Judge Saffels ruled that Kansas motor fuel taxes can not be imposed "on any and all transactions involving the sale of motor-vehicle fuels to all federally recognized Indian tribes which in turn sell the fuel as a retailer on reservations and trust land located within the state of Kansas." p. 22. *Sac & Fox* observed that the Indian Tribes "operate retail gas stations on their reservations, and assess tribal taxes on their motor-fuel sales." p. 2. *Sac & Fox* held under the balancing test for federal preemption of state law that the tribal interests outweighed the state's interests and, therefore, that "the

tax in question must be invalidated as it relates to transactions involving tribal retailers." p. 20-22.

14. Under the particular facts of this case, a preliminary and permanent injunction should be issued for the Nation.

15. This complaint requests prospective declaratory and injunctive relief. Under the circumstances of this case, the State of Kansas does not have sovereign immunity under the Eleventh Amendment to the U.S. Constitution or otherwise.

FIRST CLAIM FOR RELIEF
[Declaratory Judgment, 28 U.S.C. § 2201]

16. The Nation restates and incorporates by reference all of the allegations otherwise set forth in this complaint.

17. The Nation has filed this complaint in order to prevent the defendant's ongoing violation of federal law by attempting to impose Kansas motor fuel taxes with regard to motor fuel obtained by a sovereign Indian government and sold by it at retail on its Indian reservation. This complaint requests prospective declaratory relief through judicial determinations which include the following paragraphs 18 through 22 and any other related determinations.

18. The Nation possesses the sovereign power and authority, under the Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination, the Act for Admission of Kansas § 1 and other federal law, to enact tribal motor

fuel tax laws with respect to motor fuel delivered or sold on its reservation.

19. The Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination, the Act for Admission of Kansas §1, comity, and other federal law a) guarantee and authorize the Nation to impose tribal motor fuel taxes with respect to motor fuel delivered or sold on its reservation and b) prohibit the application or enforcement of the Kansas motor fuel tax laws with respect motor fuel sold by the Nation at the Nation Station because such state taxes i) infringe upon and impair the Nation's sovereign right to impose and collect tribal motor fuel taxes, ii) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for the reservation, iii) infringe upon and impair the Nation's sovereign right to self-government and self-determination and iv) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation.

20. The Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination and other federal law prohibit the application or enforcement of the Kansas motor fuel tax laws with respect to motor fuel sold by the Nation at the Nation Station because the federal and tribal interests in imposing the tribal motor fuel taxes and in the Nation being able to operate the Nation Station outweigh the interest of the State of Kansas in imposing its motor fuel taxes, and there is no federal law to the contrary.

21. The defendant is without jurisdiction or authority to impose Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail

on its reservation. The state's motor fuel taxes are prohibited by federal law and are void to the extent they purport to subject this motor fuel to such taxes.

22. Any effort by defendant to enforce Kansas motor fuel tax statutes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation would constitute an act in excess of defendant's authority and any authority that the State of Kansas could confer.

WHEREFORE, the Nation prays as hereinafter set forth.

SECOND CLAIM FOR RELIEF
[Preliminary and Permanent Injunction,
Fed. R. Civ. P. 65]

23. The Nation restates and incorporates by reference all the allegations otherwise set forth in this complaint.

24. This complaint requests prospective preliminary and permanent injunctive relief in order to prevent the defendant's ongoing violation of federal law by applying or enforcing the Kansas motor fuel tax laws with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation.

25. For purposes of the preliminary injunction, the imposition, liability for, reporting, collection, and remittance of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation will cause it material and irreparable harm by depriving it of tribal tax and operating revenue necessary for it to perform essential governmental functions.

26. Neither the defendant nor the State of Kansas will suffer material damage by the issuance of a preliminary injunction. The issuance of this injunction is in the public interest given the Nation's likelihood of success on the merits.

27. A permanent injunction which prohibits the imposition, liability for, reporting, collection, and remittance of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation is proper because such actions violate the Act for Admission §1, the U.S. Constitution, other federal law, comity and the Nation's sovereign right of self government and self determination.

WHEREFORE, the Nation prays as follows:

1. That the court enter a declaratory judgment as set forth in paragraphs 17 through 22 herein.

2. That the court preliminarily and permanently enjoin the defendant from enforcing its state motor fuel taxes, including those under K.S.A. 79-3408, and from collecting such taxes from the Nation or its distributors with respect to motor fuel transactions or events involving motor fuel obtained by the Nation and sold by it at retail on its reservation.

3. That the court award the Nation its cost of suit and attorneys fees from the defendant to the extent authorized by law.

4. That the court grant the Nation such other relief as the court may deem proper.

/s/ David Prager, III
David Prager, III, KS# 10090
16281 Q Road
Mayetta, Kansas 66509
(785) 966-4030
(785) 966-4086 (fax)
Attorney for the plaintiff

The plaintiff hereby designates Topeka, Kansas as the place for trial within the District of Kansas for the above-captioned complaint.

/s/ David Prager, III
David Prager, III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 1

AFFIDAVIT OF JAMES POTTER

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, James Potter, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Treasurer and Tax Commissioner of the Prairie Band Potawatomi Nation. I am also a council member of the Nation's Tribal Council. I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation and of the Nation's relationship with the State of Kansas.

2. A. The Nation has generated significant on-reservation value by financing, constructing and owning its 35 million dollar casino on its reservation. The Nation furnished 100% of the construction cost. The casino is located on reservation U.S. trust land and is operated under the Indian Gaming regulatory Act (25 U.S.C. §2701 *et seq*.) The Nation receives 100% of the net revenues from the casino. The Nation oversees the management of its

casino. A significant number of the casino's employees are the Nation's tribal members or their family members.

By building the casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. This has created a market for the Nation Station's products. The casino has generated the substantial market value of bringing consumers to the Nation Station to buy its products. The Nation Station's retail fuel business exists because of the flow of vehicle traffic to and from the casino and because of other reservation-related vehicle traffic, not because the Nation Station is selling fuel at less than fair market prices or marketing a state tax exemption.

B. The Nation has generated additional value by financing and constructing the Nation Station and its facilities for the unloading, storage, dispensing and monitoring of gasoline and diesel motor fuel. The Nation Station is a tribally-owned and operated convenience store and gas station. The Nation Station is located on 150th Road between P and Q Road on the same U.S. trust land as the casino.

3. A. The tribal motor fuel taxes paid by the Nation Station is expended by the Nation through its Road and Bridge Department to perform the governmental functions of constructing and maintaining roads, bridges and rights-of-way on and near the Nation's reservation. This is required by PBP Code § 10-6-7, which states that:

> "All tribal motor fuel tax revenue imposed and collected hereunder shall be used by the Prairie Band Potawatomi Nation's government for the purpose of constructing and maintaining roads,

> bridges and rights-of-way located on or near the Reservation."

B. The tribal fuel taxes from the Nation Station and from other sources generates important tax revenue for the Nation's government. These taxes enable the Nation to provide essential governmental services to its reservation.

C. The Nation's tribal government provides the majority of the overall governmental services for the Nation Station, its Indian and non-Indian customers and the reservation as a whole. These tribal governmental services include road and bridge construction and maintenance, law enforcement, fire protection and emergency medical, child care, education, zoning, environmental protection, tribal court and many other government services. Many of these tribal government services are also provided to the company that distributes motor fuel to the Nation Station.

4. The indirect burden of the state tax falls on the Nation's retail fuel business and interferes with the Nation's self-government right of tribal taxation. The defendant's attempted enforcement of the state fuel tax has a direct and substantial adverse impact on the Nation Station and the Nation. The Nation Station's cost of fuel with the state tax imposed would destroy its business and would make it impossible for the Nation to collect tribal fuel taxes from it. The higher retail prices that the Nation Station would be forced to charge if the state tax were imposed would put it out of business.

The application or enforcement of the Kansas motor fuel tax laws with respect motor fuel sold by the Nation at the Nation Station would (a) infringe upon and impair the

Nation's sovereign right to impose and collect tribal motor fuel taxes, (b) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for its reservation, (c) infringe upon and impair the Nation's sovereign right to self-government and self-determination and (d) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

5. A. The defendant's enforcement of the state motor fuel tax laws is discriminating against the Nation. The defendant is discriminating by attempting to tax fuel delivered to the Nation's jurisdiction but not taxing fuel delivered to state, foreign or other taxing jurisdictions or territories.

B. The state motor fuel taxation laws also discriminate against the Nation by causing the payment of 40.5% of the state motor fuel tax collections to non-tribal local government while paying nothing to the Nation's tribal government. See K.S.A. 79-34,142, 79-3425 and 79-3425c. This discrimination is particularly unfair because the Nation is paying for most of the road and bridge maintenance and construction on its reservation.

6. As a policy matter, the State of Kansas does not have a material state interest in imposing its motor fuel taxes with respect to fuel delivered to the Nation's reservation. The State has an historical policy interest in not imposing state tax with respect to fuel delivered to Indian reservations. In the early 1990's, Kansas Governor Finney agreed that the State should relinquish any state tax

authority with respect to the Nation's reservation. Governor Finney also agreed that if the Nation was imposing its own tribal taxes, the State should not seek to impose its taxes. (See attached copy of this Compact, dated January 10, 1992.) The State has a policy that motor fuel should not be subject to double taxation. (See also K.S.A. 79-3424 and K.S.A. 79-3408(d)(1).) The state also has the policy of not taxing motor fuel which is delivered to other jurisdictions or territories under K.S.A. 79-3408(d)(1).

7. Motor fuel has been continuously delivered to the Nation Station for retail sale since at least September 30, 1999. The Kansas Department of Revenue, through its employees, who are under the defendant's direct or indirect supervision, has contacted the Nation's fuel supplier and issued assessments against the supplier to attempt to force it to pay the state fuel tax for the fuel that is being delivered to the Nation Station.

8. The Nation and its members on the reservation pay Jackson County real property taxes with respect to reservation fee land to pay a portion of the school, fire district, law enforcement costs.

Further affiant sayeth not.

/s/ James Potter
James Potter

Subscribed and sworn to before me this 21st day of December, 2000.

/s/ Theresa J. Kitchkommie
Notary Public

Theresa J. Kitchkommie
NOTARY PUBLIC
State of Kansas
My Appt. Expires
08-27-02

TAX COMPACT BETWEEN
THE PRAIRIE BAND OF POTAWATOMI INDIANS
AND THE STATE OF KANSAS

This Compact is made this 10th day of January, 1992, by and between the Prairie Band of Potawatomi Indians (hereinafter the "Tribe") and the State of Kansas (hereinafter the "State"):

Whereas, The Tribe is a federally recognized Indian tribe, duly-organized pursuant to the Constitution and By-Laws of the Prairie Band of Potawatomi Indians, approved by the Secretary of the Interior on February 19, 1976, as amended thereafter, and

Whereas, both the Tribe and the State recognize the duty of each to negotiate with the other on a government-to-government basis pursuant to our national Indian policy of economic, social and political self-determination for Indian tribes; and

Whereas, the Supreme Court has repeatedly recognized the inherent sovereign power of Indian tribes to

impose and collect taxes upon businesses operating within their reservation boundaries; and

Whereas, it is agreed between the Tribe and the State that it is to their mutual benefit to cooperate in matters relating to taxation; and

Whereas, the Legislature of the State of Kansas has authorized tax collection agreements between the State and Indian tribes to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on reservations and those off reservations;

Now therefore, the Tribe and the State agree as follows:

1. Definition of Terms. As used in this Compact each of the following terms shall have the following meaning, unless the context clearly indicates a different meaning:

(a) "Reservation" means all Indian country as defined by 18 U.S.C. § 1151 which is subject to the jurisdiction of the Tribe.

(b) "Excise tax" means, respectively, a tax on sales (K.S.A. 79-3601 *et seq.*); a tax on cigarettes (K.S.A 79-3301 *et seq.*); a tax on motor fuels (K.S.A. 79-3401 *et seq.*); a tax on special fuels (K.S.A 79-3474 *et seq.*); tax on special fuels (K.S.A. 79-3474 *et seq.*); and a tax on tobacco products (K.S.A. 79-3370 *et seq.*); and any of the foregoing five taxes established by tribal law.

(c) "Local option tax" means any tax imposed by a Kansas county upon any transaction occurring

on the Reservation or upon any other product or activity upon the Reservation.

2. State Taxes Not to be Imposed. No state excise tax or local option tax shall be imposed upon any transaction with a non-Indian purchaser which occurs on the Reservation while the Tribe shall have in effect and shall actively impose, collect and enforce upon any such transaction, an excise tax of not less than sixty percent (60%) of the rate of such state excise tax for each such excise tax included within the definition of that term in subsection 1(b) of this Compact.

3. Proof of Tribal Tax Ordinance. Such tribal tax shall be deemed to be enacted only when a copy of the tribal tax ordinance, together with a fully executed copy of the enacting resolution of the Tribal Council, is filed with the Tribal Secretary; within ten (10) days thereafter, a copy of the tribal tax ordinance and an executed copy of the enacting resolution of the Tribal Council shall be filed with the Department of Revenue.

4. Tribal Contribution to Banner Creek Reservoir Project. The Tribe agrees to pay to Jackson County a tribal contribution to the Banner Reservoir Project in the sum of $16,000.00 per annum.

5. Violation of Tribal Tax Law; Enforcement of Penalties for Violations.

(a) Notice of Probable Violation to Tribal Council. Whenever it shall come to the attention of the Director of Revenue that any person is probably conducting business on the Reservation without collecting and remitting tribal taxes as required by this Compact, the Director shall notify the Tribal Council

of such violation and of the need for tribal enforcement of tribal penalties for such violation in Tribal Court of such offender either civilly or, in case such person is an enrolled member of any Indian tribe, civilly or criminally or both, as the Tribal Council may determine.

(b) Enforcement of Penalties for Violations in Tribal Court. At any time it deems a violation of tribal tax laws to have occurred, or within thirty (30) days of receipt of any such notice of violation from the State, the Tribal Council shall file an action in Tribal Court to enforce tribal penalties against such person either civilly or criminally or both, as the Tribal Council may determine.

(c) State Inspection of Tribal Tax Records. In such enforcement action in Tribal Court, all tribal tax records with respect to pertinent transactions on the Reservation involving the person against whom tribal penalties are being enforced shall be made evidence of the Tribal Court and as such shall be open to inspection by the State at any time.

6. Terms of Relinquishment of State Jurisdiction. The State hereby relinquishes whatever jurisdiction it may have to impose and collect excise taxes as herein defined from any merchant upon any transaction with a non-Indian purchaser which occurs on the Reservation, subject to the following conditions:

(a) Such merchant shall be authorized to do business on the Reservation pursuant to applicable tribal law;

(b) Such merchant shall pay such corresponding excise taxes to the Tribe; and

(c) Such excise taxes imposed and collected by the Tribe shall be not less than sixty percent (60%) of corresponding excise taxes imposed by the State on any such transaction outside the Reservation.

7. Term of Compact Renewal. The term of this Compact shall be for a term of five (5) years from the effective date hereof; provided, however, that this Compact shall be renewable for additional five (5) year terms by mutual consent of the Tribe and the State as follows:

(a) Periodic Review. The provisions of this Compact shall be subject to review at five (5) year intervals dating from the effective date of this Compact One hundred eighty (180) days prior to the expiration of any such five (5) year term, either party to this Compact may notify the other of provisions which it believes require review or amendment. Such notice shall be in writing and shall be sent by certified mail to the Chairman of the Tribe, the Governor of the State or any other appropriate governmental official of either.

(b) Notice of Need to Resolve Issues. Upon receipt of such notice by either party, the parties shall engage in good faith efforts to resolve the issues identified in the notice. The parties shall have the balance of the 180-day period within which to negotiate. The Tribe and State may agree to extend the 180-day period without prejudice to the rights of either party.

(c) Termination for Failure to Resolve Issues. In the event the parties are unable to resolve the issues identified in the notice within the balance of the 180-day period or any extension thereof, upon the expiration of such period, this Compact shall terminate.

(d) Termination for Substantial Breach. Either party may terminate this Compact upon a substantial breach by the other party regardless of any other provision of this Compact. Upon identification of what either party believes to be a substantial breach of the terms of this Compact, such party shall notify the other party in writing, via certified mail, return receipt requested, as to the nature of the substantial breach. The party issuing such notice shall refrain from terminating this Compact until 30 days have elapsed from receipt of such notice by the other party.

8. Tribal Sovereign Immunity Not Waived. Nothing contained in this Compact shall be deemed to waive the sovereign immunity of the Tribe to suit in any court, state or federal.

9. Effective Date. This Compact shall be binding and effective only after it has been approved by the Governor of Kansas, and the Tribe by written resolution of the Tribal Council; the last such date shall be the effective date hereof.

Witness our hand and seal this 10th day of January, 1992.

/s/ Mark Beshears
Mark Beshears, Director
Department of Revenue

/s/ George Wahquahboshkuk
George Wahquahboshkuk,
Chairman
Prairie Band of Potawatomi
Indians Tribal Council

/s/ Grace Wahwassuck
Grace Wahwassuck,
Secretary

Approved:

/s/ Joan Finney
Joan Finney
Governor of Kansas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 2

AFFIDAVIT OF CHRISTOPHER C. PFLAUM

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

I, Christopher C. Pflaum, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I have been retained as an expert witness by the Prairie Band Potawatomi Nation (the "Nation") for its proceeding pending in the U.S. District Court for Kansas, Case No. 99-4071-DES. I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation and of the Nation's relationship with the State of Kansas.

2. I have prepared my Expert Report dated June 27, 2000 (the "Report"), a copy of which is attached and incorporated herein by reference. I have read the Report and am familiar with the contents thereof, and the facts and opinions set forth therein are true and correct to the best of my knowledge, information and belief.

Further affiant sayeth not.

/s/ CC Pflaum
Christopher C. Pflaum

Subscribed and sworn to before me this 26TH day of November, 2000.

[SEAL]

/s/ Judy C. Conn
Judy Conn
Notary Public

United States District Court For The District of Kansas

Prairie Band of Potawatomi Indians

vs.

Karla Pierce,
Secretary of the Kansas Department of Revenue
Case No. 99-4071-DES

Expert Report of

Christopher C. Pflaum, Ph.D.
Spectrum Economics, Inc.

June 27, 2000

TABLE OF CONTENTS

Section 1 – Qualifications and Experience 1
Section 2 – Foundation For Opinions 1
Section 3 – Overview and Summary 1
Section 3.1 – Questions Posed 2
Section 3.2 – Conclusions 3

Section 4.0 – Analysis of NS Operation 4
Section 4.01 – Nation Station Location and Operation 4
Section 4.02 – Nation Station Fuel Pricing 5
Section 4.03 – "Value Added Activity" 6

Section 5 – The Tribal Fuel Tax and Government Operation 7
Section 5.01 – PBP Road Construction and Maintenance 7
Section 5.02 – Collection and Use of Fuel Tax 7

Section 6 – Conclusion 8
Appendix 1 – Curriculum Vita for Christopher C. Pflaum
Appendix 2 – Listing of References
Appendix 3 – Supporting Documents
Appendix 4 – Survey Results

Section 1 – Qualifications and Experience:

My education, work experience, publications and speeches, and previous testimonies are detailed in the curriculum vita attached to this report as Appendix I. I have previously served and currently act as a consultant to numerous clients in a broad array of business litigation and regulatory matters. I have also, in the past, testified on tax issues before the tax authorities in both Kansas and Missouri.

My curriculum vita is provided in Appendix 1 to this report. To date, Spectrum Economics, Inc. has billed the

Prairie Band of the Potawatomi Indians approximately $8,000 on this matter.

Section 2 – Foundation For Opinions:

I have served as a consultant or testifying expert in numerous business litigation and regulatory matters, before both state and federal courts and numerous administrative agencies. My firm has rendered opinions in several cases involving convenience stores (C-stores) like Nation Station and we are generally knowledgeable regarding their operation. As a result of my formal education, prior litigation and regulatory engagements and previous work experience as a policy analyst for a government agency, I am familiar with the principles of taxation and the effect of a sales or excise tax on the demand for the product taxed as well as the ability or inability of a merchant to pass on a tax to ultimate consumers.

In preparing this report, I have relied on documents including District, Appellate and Supreme Court decisions on the issue of taxation of Indian commerce, provided by the Prairie Band of Potawatomi Indians (PBP) and its counsel, David Prager III. I also consulted several textbooks on Microeconomics and Industrial Organization. A listing of the references consulted can be found in Appendix 2 to this report.

Section 3 – Overview and Summary:

The PBP operates a casino on its reservation located on approximately 121 square miles near Mayeta, Kansas and about fifteen miles north of Topeka. Adjacent to the casino are a hotel and a C-store, the Nation Station (NS). The Nation Station is a typical modem C-store with a merchandise mix of 70% gasoline and diesel fuel, 20%

cigarettes and 10% food. The proportion of food sales is somewhat higher than average and cigarettes somewhat lower.

The PBP imposes a tribal tax on fuel sales made by the NS at a rate of 16¢ per gallon of gasoline and 18¢ per gallon of diesel fuel which is 4¢ per gallon less than the corresponding average Kansas state motor fuel tax. The state has moved to collect the state fuel tax with respect to fuel sold at the NS and the PBP has brought the instant action to prevent that collection action by the State. If the State is able to impose its tax, the Nation will not be able to impose the tribal tax and still be competitive with surrounding gasoline retailers.

There are numerous legal and economic issues which combine to determine whether a state can tax economic activities that pertain to Indian land. Some of these are purely legal issues such as aspects of the U.S. Constitution, treaties, petitions for Statehood issues and laws passed by Congress specifying the rights of Indians. Other issues are susceptible to economic analysis. Examples of such issues are questions such as whether an activity would be undertaken but for a tax exemption; whether the imposition of a tax by the State unreasonably burdens an activity taken on the reservation; and, whether the collection of a tax by the state economically interferes with the ability of a Tribe to govern itself.

Section 3.1 – Questions Posed

The PEP posed the following specific questions to Spectrum Economics:

> "1. Is the value marketed by the Nation Station's retail fuel business to its customers derived

from value generated on the reservation by activities in which the Nation has a significant interest? Is the Nation Station's on reservation value a result of its location and of the Nation's effort to supply and market the fuel?

2. Is the Nation Station marketing an exemption from state motor fuel taxation? What is the typical range of fair market prices for motor fuel? Are the Nation Station's fuel prices being set below the fair market prices in order to draw customers from surrounding areas or to give it a competitive advantage over businesses in the surrounding area? Is the Nation Station making sales to non-Indians who are traveling to it in order to take advantage of the claimed exemption from state fuel taxes? Does the market for the Nation Station's fuel products exist because of the Nation's claimed exemption from the state fuel tax?

3. In the event the state fuel tax were imposed in addition to the tribal fuel tax, what would be the effect a) on the price and demand for the Nation Stations's fuel products, b) on the value to the Nation of the Nation Station business and c) on the ability of the Nation to impose its tribal fuel tax on fuel sold on the reservation?

Would the imposition of the state tax in addition to the tribal fuel tax have a substantial adverse impact on the Nation's interests? Could the burden of the additional state fuel tax be passed on to the retail customer? Is the demand for motor fuel sufficiently elastic that the Nation Station's business would be significantly reduced to the point of being essentially eliminated if the state tax were imposed in addition to the tribal tax? Would the tribal Motor fuel tax receipts be

significantly reduced to the point of being essentially eliminated if the state tax were imposed in addition to the tribal tax? Would the imposition of the state fuel tax destroy the Nation's governmental ability to impose tribal fuel taxes with respect to fuel sold on its reservation?

Can it be concluded that the ultimate economic burden of the state motor fuel tax falls on the Nation?

4. Does the economic burden of the state motor fuel tax substantially interfere with the Nation's internal ability to raise tribal taxes in order to finance the tribal government function of constructing and maintaining roads and bridges on the reservation? Is there a direct conflict between the state and tribal motor fuel tax schemes? Will the Nation's governmental system of motor fuel taxation be rendered ineffective and of little value if the enforcement of the state motor fuel taxes is permitted to continue?"[1]

In preparing this report, we have recast these questions into economic terms. We cannot comment on the legal issues inherent in them but we can address them as a matter of economics.

Section 3.2 – Conclusions

It is my expert opinion that:

- The demand for gasoline is highly elastic in the relevant market and that the Nation does not have the market power to impose its tax

[1] Letter from David Prager III to Christopher C. Pflaum, June 9, 2000.

in addition to the Kansas tax. Were it to try and do so, the Nation Station would sell virtually no gasoline or diesel fuel. Hence, if the State is successful, the Tribe will not be able to collect its tax on motor fuel sales on the reservation.

- The Nation Station is part of the economic infrastructure of the reservation and its customer base is comprised of visitors to the Nation's gaming operations, non-resident reservation workers and residents of the reservation. By virtue of its location and lack of nearby highway advertising, NS does not seek to nor does it compete for fuel purchases from those who would not otherwise be on the reservation.
- Because the Nation sets its fuel tax at approximately the same level as that of the State of Kansas, it is not establishing a competitive advantage for Nation Station by virtue of not collecting the State of Kansas tax.
- Furthermore, the Nation is not "marketing a tax exemption" because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market.
- Motor fuel taxes are user fees which are designed to collect revenues to build and maintain roads and are generally reserved for these government functions. The fuel tax imposed by the Nation is similarly earmarked for construction and maintenance of reservation roads. These activities completely utilize that tax and Nation fuel tax monies are not permitted to be used for any other purpose.

If the State is allowed to collect its tax, the Nation will be unable to collect its tax and the road construction and maintenance program of the Nation will suffer which will, in turn, impair the Nation's governmental plans to serve the reservation. Alternatively, the Nation will have to divert general funds to road construction and maintenance which will cause it to reduce its expenditures on other governmental programs and projects. This will impair the ability of the Nation to govern itself.

- The State of Kansas returns a portion of the state fuel taxes its [sic] collects to local communities. The State also funds construction of roads, highways and intersections throughout the state. The State of Kansas does not provide such aid to the Nation for the construction and maintenance of reservation roads. At present, the Nation's fuel tax is the only source of tax funds for these governmental operations.

Section 4.0 – Analysis of NS Operation:

Though I do not have legal training, the cases involving taxation with respect to commercial enterprises operated on Indian lands do consider economic principles which underlie recent decisions. The science of economics assists in making taxation decisions since they are inherently economic in nature.

It is my understanding that, as a general principle, state taxation of tribal commerce may be construed to interfere with tribal self-government. However, state taxation has been permitted in some cases where the Indian enterprise

is "marketing a tax exemption" by selling a product to non-Indians who would, but for the lower price resulting from a tax exemption, buy elsewhere. In other words, if the "raison d'etre" for the business is a tax exemption that allows the Indian operation to prosper at the expense of competitors because it can sell a product such as cigarettes or gas for less, state taxation may be permitted. The question of whether a state tax is permitted also considers the extent to which the state or the tribe provides a service that is linked to the tax, such as road construction funded from fuel taxes. Here the legal analysis parallels the classic "free rider" problem found in the economic literature.

In this Section, I discuss the economics of the Nation Station operation and the funding of PBP government activities. I compare the NS to the reservation "smoke shops" and other activities that the courts have found are not exempt from state taxation.

Section 4.01 – Nation Station Location and Operation

The Nation Station is a modem 8400 square foot convenience store constructed for the PBP at a cost of $1.4 million located adjacent to the PBP gaming operations operated by Harrah's. It is approximately two miles from the nearest highway (US 75) and is not visible from the highway nor is there any indication on the highway of NS's existence, prices, etc. From a locational standpoint, NS is poorly situated compared to a typical C-store, especially to market motor fuels to travelers on the adjacent highway. C-stores are typically located on a highway with "easy on-easy off" access and have easily readable signage advertising the pricing of fuel and/or cigarettes.

The NS also does not have the number of pumps that one typically finds at a dedicated fuel outlet; it has a single canopy with four two-sided pumps which can accommodate a maximum of eight automobiles and one diesel island which can accommodate four trucks. The store is substantially larger than the average C-store (2500 sq ft) and does a somewhat higher dollar volume of business.

Any fuel outlet "marketing a tax exemption" will clearly appeal to the truck business. Truckers buy fuel in large quantifies and are very price sensitive. To do business with truckers, a station must be signed up with one of the major fuel card operations (Comdata, T-Chek, etc.). Nation Station is not signed up with any of these operations and does not have a Trendar or other system to take their cards as payment for diesel fuel. This being the case, the NS can not be considered a meaningful competitor in the market for fuel sales to truckers.

Clearly, NS is sited to take advantage of the traffic generated by the casino. It is located off the parking lot between the casino/hotel and the road to US 75. This is a convenient location for casino patrons and employees to stop for gas, cigarette and soft drinks on the way to or from the casino. It is not convenient to US 75 and motorists traveling that highway would be unlikely to exit solely for the purpose of buying gas. In fact, a survey done by the PBP tribal government at our request, shows that only 11% of NS customers stopped at the store for the specific purpose of buying gas. Thirty percent of customers bought no gas. Casino patrons and employees of the casino and Nation make up 73% of the NS fuel customers. The trade area of the NS is typical of a C-store, a one to two mile radius.

The NS also provides important services to residents of the reservation and reservation workers. It is the only "fast food" outlet on the reservation or within 2 miles of the government center. It serves approximately eighty meals per day to members of the Nation and reservation workers and casino workers and patrons. In addition, it is the only station owned by the Nation serving the 475 PBP members living on its 121 square mile reservation. About 11% of its fuel customers are people who work or live on the reservation, other than at the casino, and the NS also supplies fuel to the Nation's government vehicles.

The product mix of the NS is typical of a neighborhood convenience store, 70% fuel and 20% cigarettes and 10% food, snacks and other merchandise. The cigarette sales are somewhat below typical levels but this is due, in part, to the relatively high per gallon price of gasoline in the last six months which has raised the fuel share of dollar sales.

It is clear that the "value marketed" by Nation Station results from the business generated by the casino and from employees of the casino and PBP government and residents. But for the casino, there would not be enough traffic to support the C-store in its current location. The NS is a good example of what appraisers call a "location dependant business." Furthermore, the location of the C-store fits well with the economic development plans as presented in the Nation's land use plan for the reservation which forecasts the development of other commercial operations and expanded residential facilities in the eastern sections of the reservation.

Section 4.02 – Nation Station Fuel Pricing

Motor fuel is a commodity which is sold in local markets. Economic theory teaches that a given product cannot sell for different prices in the same market. By branding or value added merchandising strategies merchants can earn greater margins but the increment is small. The Nation Station faces numerous competitors past which casino customers travel and who advertise their prices in signage visible from US 75. These stations include:the Indian Country General Store at 19075 US 75 Highway (on US 75 near 190th Road) and the Indian Country Mini Mart at 20330 US 75 Highway (1½ miles north of the Indian Country General Store), both of which are in Jackson County, and the Kickapoo station and the Sac and Fox station, both of which are on US 75 just north of Jackson County in Brown County.

Because numerous competitors are situated nearby, Nation Station does not have any "market power" which would allow it to charge supra competitive prices. This competition effectively caps the pricing of motor fuel at Nation Station. Many of these stations are much larger outlets for fuel than the NS and set their prices very aggressively. Because of its convenient location relative to the casino and its food and drink offerings, NS would not loose [sic] all of its business if it charged slightly higher than market prices. However, if it charged significantly higher prices, economic theory teaches that the station would loose [sic] enough sales to make the price increase unprofitable and force the Nation Station to reduce its price back to market level. It is, therefore, impossible as a practical matter for the NS operate if both the Nation's and State's motor fuel taxes are imposed on the fuel sold there.

By policy, the NS sets its selling prices for motor fuel to be within 2¢ per gallon of the regional average. Since this price is within the range of local market prices, NS must be considered to be selling at the market price and, by definition, the tribe is not marketing a tax advantage at the NS.

Section 4.03 – "Value Added Activity"

The model of the type of Indian enterprise that has been looked upon with disfavor by the courts is the "smoke shop." State and local taxes have historically accounted for as much as one half of the cost of a pack of cigarettes; New York, for example, has a State tax of $1.18 per pack and the sales tax rate in most areas of New York State is about 8% or another 20¢ per pack.

Some Indian Nations have set up stores to sell cartons of cigarettes to non-residents. The tribes that operate these shops advertise heavily along major highways through and near their reservations often marketing their state tax exemptions with signage that displays "No State Cigarette Tax" in the advertising message. Since the stores are out-of-the-way, they would enjoy little traffic but for the substantial savings due to lack of state taxes that customers enjoy. My personal observation is that customers to these smoke shops tend to buy several weeks or more supply of cigarettes.

There is little "value added" by these operations. They do not have a merchandise mix which meets the need of travelers or other cognizable group of consumers (other than smokers). They are generally passive conduits between the wholesaler and ultimate consumers and do not add significant value to the products that they sell

through management, marketing or merchandising acumen or location.

The Nation Station is a very different value proposition. The Nation recognized that casino customers and employees travel distances, sometimes substantial distances, to get to the reservation. These travelers should be attracted to a convenient place to buy gas, snacks, drinks and cigarettes before getting on the highway. Therefore, the Nation built a modern, full-service convenience store and strategically placed it so that it was easily accessible to travelers going to and from the casino. The store is a model operation, entirely state-of-the-art in C-store layout and design. To argue that this business does not add value is to entirely dismiss the contribution of retailing to the product value proposition.

Section 5 – The Tribal Fuel Tax and Government Operation:

Indian tribes have sovereign rights, established by treaty and by federal law, the most basic of which is self-government. A fundamental element of sovereignly [sic] is the control and taxation of commerce on the sovereign's lands. Further, if the sovereign cannot tax, it cannot fund government and hence, it cannot govern.

A basic question in this matter is the extent to which the action of the State of Kansas in levying a tax on fuel sold at the NS would undermine the ability of the PBP to act as a government. In this section, I discuss the operations of the government and how the right to collect the tribal tax affects government operations.

Section 5.01 – PBP Road Construction and Maintenance

The PBP reservation outside Mayetta, Kansas is 121 square miles. At the present time, there are 212 miles of roads on and through the reservation and numerous bridges. These roads provide access to commercial and government establishments, residences of both tribal members and non-members living on reservation grounds and access to crop lands and agricultural facilities. In many respects, the reservation is a microcosm of rural Kansas – predominantly sparsely populated and criss-crossed by farm-to-market roads.

The Nation provides road and bridge construction and maintenance services on reservation property having primary responsibility for 118 miles of the 212 miles of road on the reservation. Reservation roads comprise approximately 1/6th of the roads in Jackson County and the Nation maintains almost 10% of the county's roads without any ongoing financial assistance from the county or the state.

The government of the PBP Nation carries out these responsibilities through its Road and Bridge Department which employs 32 persons, 31 of whom are Prairie Band tribal members. The department owns, operates and maintains a fleet of twenty-two pieces of road equipment including graders, scrapers, dump trucks and back hoes and a number of small trucks worth approximately $4 million. The Nation's 2000 budget for the Road and Bridge Department is almost $2 million and 80% of this budget is expended on roads and bridges (approximately twenty percent is for other construction on the reservation).

Section 5.02 – Collection and Use of Fuel Tax

The operation of the Road and Bridge department is budgeted at $1,856,486 for 2000 of which $286,000 is expected to come from tribal taxes levied on motor fuel sales at the Nation Station. This level of expenditure and tax collection is reasonable from the perspective of either the miles of road maintained or in relation to the vehicle traffic. The State of Kansas collects $450 million per year in fuel, license, sales and other taxes and fees related to motor vehicles which it uses for construction and maintenance of 133,384 miles of highways, roads and Streets. This is a total tax collection of $3,374 per mile of road. Including bond money and federal assistance, the State spends $6,700 per mile and the counties receive an additional $1,066 from the state. The Nation receives annually $2,424 per mile of road from the only tax it collects – the motor fuels tax. Like the State, the Nation spends far more than it collects in taxes. In 2000 approximately $1.6 million is budgeted for road projects and maintenance, almost $13,600 per mile of road. The Nation is not currently able to issue tags and, unlike Kansas counties that receive back from the state 40% of fuel tax revenues collected, is not eligible for state fuel tax rebates. The Nation, unlike the counties, does not receive any portion of the sales tax collected on vehicles sold to members of the PBP Tribe.

Clearly, the Nation is taking on the road construction and maintenance responsibilities that would normally fall on the State and County. This is appropriate as the Nation is a government and expects to provide standard government services to its citizens. Since excise taxes are normally earmarked to specific government service, logic and good policy suggest that the Nation should be able to collect and

retain the fuel excise taxes which support the services that it provides.

Section 6 – Conclusion:

In Section 3.1, I quoted the questions posed to me by the PBP. The results of my study of the operation of the NS yield unequivocal answers to these questions. Clearly, the value of the NS is generated by the casino and the reservation community and the Nation has a significant interest in both. Since the NS sells fuel at the market price, it cannot be charged with "marketing a tax exemption." Both logic and the results of our survey confirm these conclusions.

Basic economic theory teaches that the NS cannot charge prices high enough to allow collection of both the Kansas and PBP fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the NS fuel business to virtually zero.

Finally, since the Nation's fuel tax is earmarked for road construction and maintenance, this activity would suffer were the State of Kansas to attempt to impose its tax or other tribal governmental services would have to be reduced to continue to support the Road and Bridge Department of the Nation's government at its current level.

Christopher C. Pflaum says that he is the President of Spectrum Economics, Inc., that he has read such report and is familiar with the contents thereof, and that the

facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ CC Pflaum
CHRISTOPHER C. PFLAUM, Ph.D.
June 27, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 3

AFFIDAVIT OF RANDY CONROY

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Randy Conroy, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I have knowledge and experience of the Prairie Band Potawatomi Nation's tribal government, of its tribal tax collection activities and of the Nation Station. During 1999 and 2000 I worked in the finance department of the Nation's tribal government and provided substantial assistance in managing the Nation Station. I also assisted the Nation's Tax Commission and am familiar with the payments of tribal fuel taxes paid to the Nation and, ultimately, transferred to the tribal Road and Bridge Department.

2. A. The Nation has generated substantial additional value by actively contributing to and managing the Nation Station as an integral part of its tribal business. The Nation Station is managed by Jon Boursaw, the Nation's Executive Director, by Jim Moulden, the Nation Station's general manager, and by Randy Conroy of the Nation's finance department. All three of them and all of the Nation Station personnel are tribal government

employees. The Nation provides all of the Nation Station's personnel, accounting, financing and management.

B. As of May 25, 2000 the Nation Station employed a total of 15 persons. Eleven of the Nation Station's employees are Indian persons, with seven of them being tribal members of the Nation. The Nation Station exercises Indian preference in its employment practices.

3. Under tribal PBP Code §10-6-1 et seq., the Nation imposes and collects a tribal tax on sales of motor fuel at the Nation Station at the rate of 16 cents per gallon of gasoline and 18 cents per gallon of diesel fuel. (See PBP Code Title 10, Chapter 6, attached.) Accordingly, the Nation Station duly paid tribal fuel taxes to the Nation in the amount of $194,474.66 for the eight-month period from October 1999 through May 2000. (Copies of the Nation Station's tribal fuel tax returns for this period are attached.) At this rate, the Nation Station is subject to tribal fuel taxes of approximately $300,000 per year. These tribal fuel tax collections are used by the Nation's tribal government to maintain and improve reservation roads and bridges. Transfers of this tribal motor fuel tax paid by the Nation Station are periodically made to the Prairie Band Potawatomi Road and Bridge Department, as required by PBP Code § 10-6-7. The Nation Station is not operating in a "tax free zone."

4. The $300,000 of tribal fuel taxes paid by the Nation Station over the past year is 100% of all of the tribal fuel taxes paid to the Nation during the past year.

5. The facts stated on my attached May 25, 2000 memorandum are true and correct. Retail sales of motor fuel generate 71% of the Nation Station's revenue.

6. A copy of the following documents are attached as exhibits and are true and correct copies.

A. State of Kansas Comparison Report, The Governor's Budget Report with Legislative Authorizations, Fiscal Year 2001, cover page and p. 9.

B. Kansas Department of Revenue, 1999 Annual Report, p. 14 and 46.

C. State of Kansas Comparison Report, The Governor's Budget Report with Legislative Authorizations, Fiscal Year 2001, p. 50

Further affiant sayeth not.

/s/ Randy Conroy
Randy Conroy

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

CHAPTER 10-6
MOTOR FUEL TAX

Section 10-6-1. Tax on Motor Fuel

(A) There is hereby imposed a tax for the privilege of doing business which is measured by the sale of motor fuel within the tribal jurisdiction,

which includes, without limitation, the entire Prairie Band Potawatomi Reservation territory. This tax shall be as follows:

(1) Gasoline Motor Fuel. A tribal tax equal to 16 cents for each gallon of gasoline or gasohol sold at retail.

(2) Diesel Motor Fuel. A tribal tax equal to 18 cents for each gallon of diesel fuel sold at retail.

The effective date for the tax rates specified in this subsection shall be October 1, 1999.

(B) The retailer of the motor fuel is the taxpayer. The above taxes shall be paid by the retailer and its shall be the duty of the retailer to collect and remit the tax from the payment made by the purchaser to the retailer, to file monthly returns with the Tax Commission, and to pay to the Tax Commission the taxes that are required to be collected.

(Amended by PBP TC No. 2000-26, February 1, 2000.)

Section 10-6-2. Payment of the Tax.

(A) Every retailer shall submit to the Tax Commission within fourteen (14) calendar days after the end of each calendar month a report which states the gallons of motor fuel sold and amount of taxes due and collected during the calendar month. The monthly report shall state the name, address and telephone number of all distributors and transporters from whom the retailer has received deliveries of motor fuel and the gallons of each kind of motor fuel received.

(B) Every retailer shall pay the taxes collected or required to be collected during the calendar month to the Tax Commission at the same time as the report for the calendar month is submitted.

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: **PBP Nation Station**
Month: **Oct-99**
License #: **PBP0100**

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	74,558	x $	0.22 =		$16,402.76
Diesel	5,632	x $	0.24 =		$ 1,351.68
Totals	80,190				$17,754.44 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	80,190
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager
Signature James W. Moulden Date 1-21-00

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: **PBP Nation Station**
Month: **Nov-99**
License #: **PBP0100**

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	113,190	x $	0.22 =		$24,901.80
Diesel	8,210	x $	0.24 =		$ 1,970.40
Totals	121,400				$26,872.20 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	121,400
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager

Signature James W. Moulden Date 1-21-00

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: PBP Nation Station
Month: Dec-99
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due	
Gasoline	147,108	x $	0.22 =		$32,363.76	
Diesel	6,302	x $	0.24 =		$ 1,512.48	
Totals	153,410				$33,876.24	**

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	153,410
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager

Signature James W. Moulden Date 1-21-00

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: January-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due	
Gasoline	153,401	x $	0.16 =		$24,544.16	
Diesel	5,227	x $	0.18 =		$ 940.86	
Totals	158,628				$25,485.02	**

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	158,628
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date 02/09/2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: February-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	152,802	x	$ 0.16	=	$24,448.32
Diesel	5,754	x	$ 0.18	=	$ 1,035.72
Totals	158,556				$25,484.04 **

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	158,556
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date March 7, 2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: March-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	141,250	x	$ 0.16	=	$22,600.00
Diesel	7,142	x	$ 0.18	=	$ 1,285.56
Totals	148,392				$23,885.56 **

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	148,392
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date April 6, 2000

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: April-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	116,655	x $	0.16 =		$18,664.80
Diesel	8,644	x $	0.18 =		$ 1,555.92
Totals	125,299				$20,220.72 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	125,299
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date May 8, 2000

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: May-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	121,848	x $	0.16 =		$19,495.68
Diesel	7,782	x $	0.18 =		$ 1,400.76
Totals	129,630				$20,896.44 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	129,630
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date June 5, 2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

[LOGO]

MEMORANDUM

TO: Jon Boursaw, Executive Director

FROM: Randy Conroy, Accountant

DATE: May 25, 2000

At the request of David Prager, I have compiled the following information concerning PBP Nation Station Convenience Store:

Total Cost of Construction:	$1,384,421.00
Total Tribal Motor Fuel Tax: Paid since opening (9/30/99):	$ 152,278.22
Fuel Sales as % of Total Revenues:	70.7%
Total Employees at C-Store (5/25/00):	15
Total Tribal Members Employed at C-Store:	7
Other Native Americans Employed At C-Store	4

If you need further information concerning the PBP Nation Station, please give me a call.

[SEAL]

STATE OF KANSAS

Comparison Report

The Governor's Budget Report with Legislative Authorizations

FISCAL YEAR 2001 /s/ Bill Graves

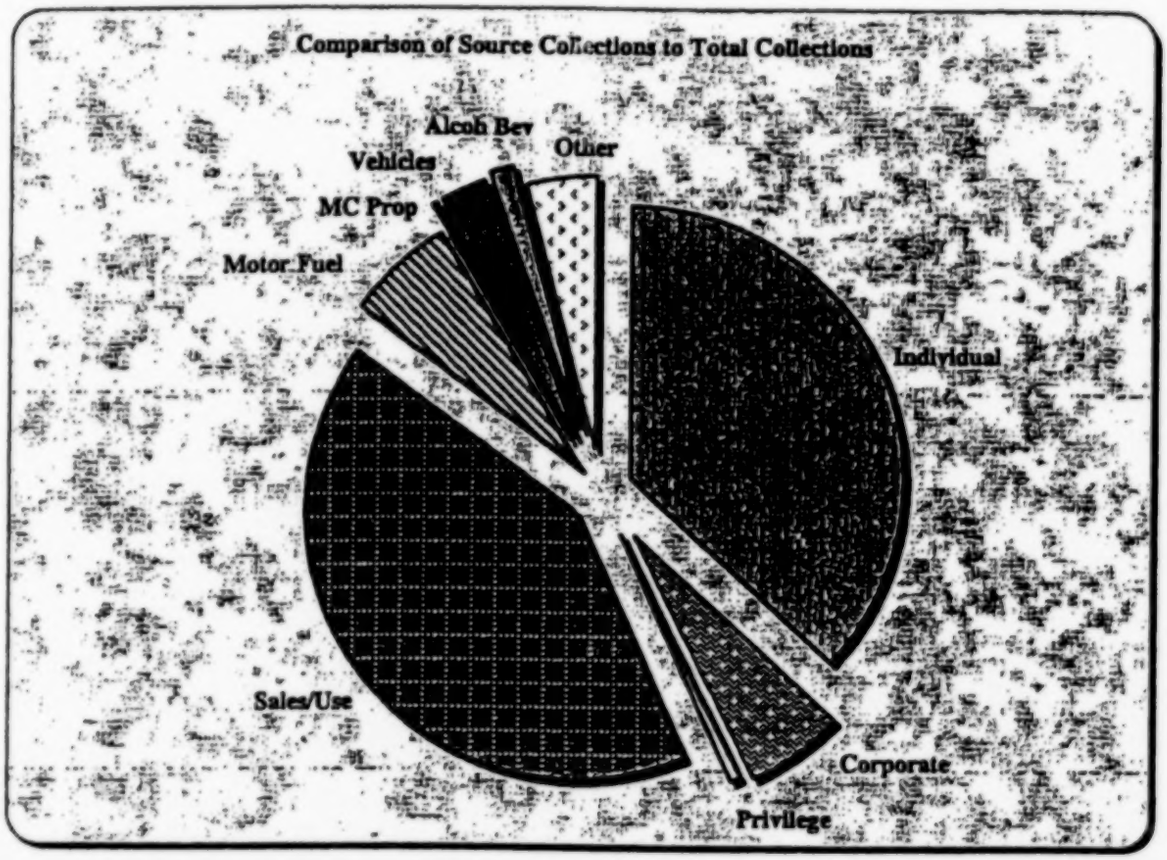
BILL GRAVES, GOVERNOR

Budget Summary for All Funding Sources

(Dollars in Thousands)

	FY 1999 Actual	FY 2000 Approved	FY 2001 Approved
Beginning Balances	$ 1,516,885	$ 1,375,079	$ 1,615,020
Add: Released Encumbrances	4,472	833	–
Net Receipts			
State General Fund:			
Motor Carrier Property Taxes	15,771	17,000	17,000
Income Taxes	1,947,367	2,075,000	2,178,900
Inheritance Taxes	81,859	64,000	65,000
Excise Taxes	1,762,419	1,834,700	1,911,172
Other Taxes	69,305	64,000	62,438
Other Revenue	101,706	107,295	186,754
State General Fund Total	$ 3,978,428	$ 4,161,995	$ 4,421,264
Special Revenue Funds:			
Property Taxes Dedicated to Building Funds	$ 30,055	$ 30,933	$ 32,198
Motor Fuels Taxes	322,588	360,815	367,609
Motor Vehicle Registration Taxes	133,595	131,000	132,000
Sales Tax Dedicated to Highway Fund	85,889	89,516	93,011
Agency Service Charges	392,905	581,331	592,620
Licenses, Permits, and Registrations	65,626	65,558	65,883
Lottery Ticket Sales	109,330	198,909	200,000
Sale of Goods and Services	244,020	239,740	250,737
Interest, Dividends, Rents, & Royalties	138,164	144,856	145,138
Federal Grants	2,088,945	2,212,578	2,294,360
Non-federal Gifts, Donations, & Grants	66,872	69,691	66,791
Other Revenue	80,210	78,419	83,861
Non-revenue Receipts	423,519	384,071	436,973
Special Revenue Funds Total	$ 4,181,717	$ 4,587,416	$ 4,761,180
Total Receipts	$ 8,160,145	$ 8,749,411	$ 9,182,444
Total Available	$ 9,681,502	$ 10,125,323	$ 10,797,464
Expenditures by Object			
Salaries & Wages	1,619,983	1,678,030	1,733,048
Contractual Services	621,787	648,563	639,798
Commodities	132,153	132,755	137,318
Capital Outlay	311,837	127,068	118,658
Debt Service	68,220	78,557	118,449
Non-expense Items	155,922	36,223	11,942
Aid to Local Governments	2,977,511	3,134,482	3,213,049
Other Assistance, Grants, & Benefits	2,062,737	2,151,689	2,273,828
Capital Improvements	512,196	549,159	554,544
Total Expenditures	$ 8,306,423	$ 8,500,303	$ 8,788,693
Ending Balances	$ 1,375,079	$ 1,625,020	$ 2,008,771

Total Department of Revenue Collections by Source



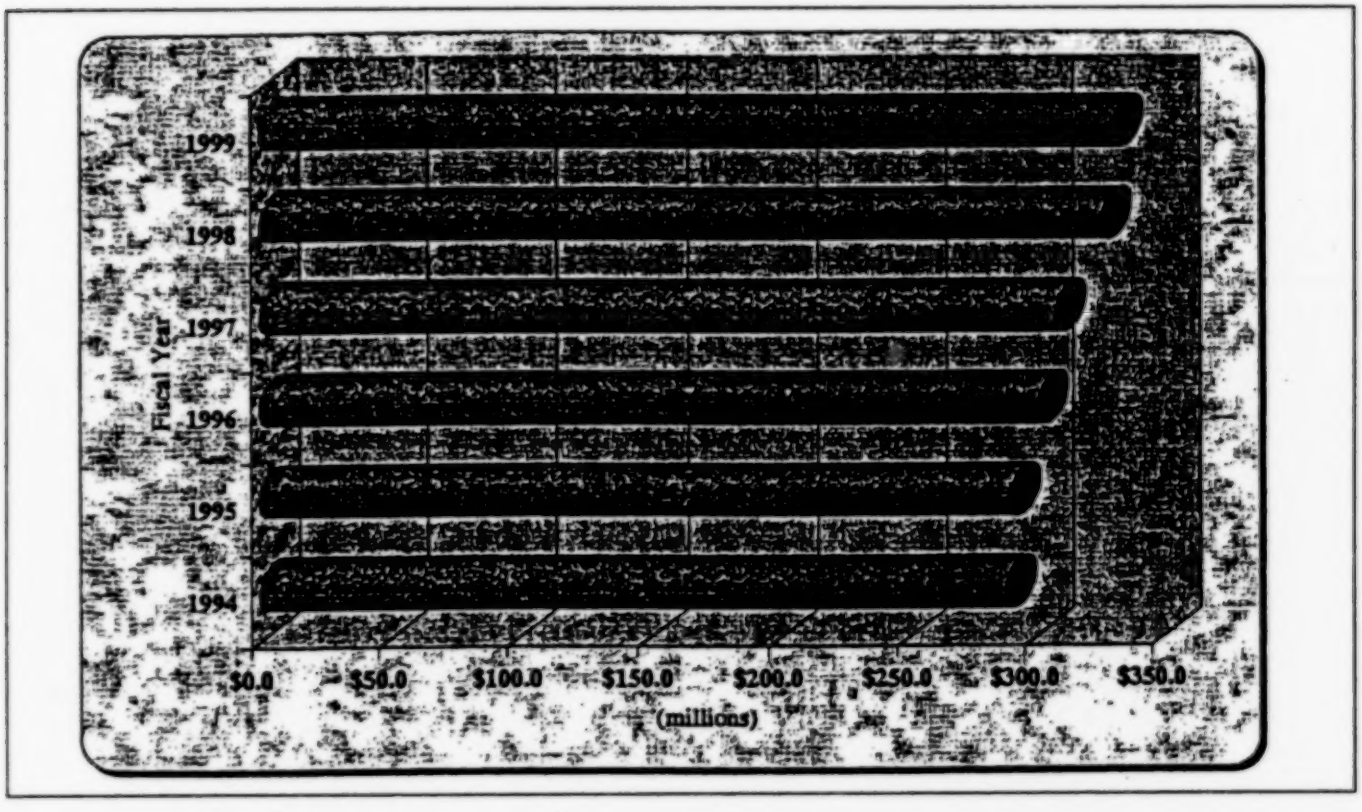
Source	Fiscal Year 1998	Fiscal Year 1999	Percent Change	Percent of FY 1999 Total
Individual Income Taxes	$1,914,147,211	1,925,832,156	0.6%	37.1%
Corporate Income Taxes	$323,802,321	$295,004,023	-8.9%	5.7%
Privilege Taxes	$26,502,579	$29,315,745	10.6%	0.6%
State and Local Sales and Use Taxes	$2,082,952,547	$2,165,821,461	4.0%	41.7%
Motor Fuel Taxes	$326,475,626	$331,151,050	1.4%	6.4%
Property Taxes: Motor Carrier	$16,168,829	$16,047,959	-0.7%	0.3%
Division of Vehicles	$130,605,367	$148,925,316	14.0%	2.9%
Alcoholic Beverage Control	$68,285,486	$72,284,737	5.9%	1.4%
Other Taxes and Fees	$237,423,348	$210,363,761	-11.4%	4.0%
Total	$5,126,363,314	$5,194,746,208	1.3%	100.0%

Other taxes and fees include: transient guest; cigarette; tobacco; controlled substances; estate; minerals; gas, oil and sand royalties; car line; bonds; licenses; and fees.

BEST AVAILABLE COPY

Motor Fuel Tax Gross Collections

On July 1, 1993, the point of taxation on special fuels was moved from the retail/user level to the wholesale distributor level. July 1, 1995 marked the start of the Governor's fuel tax evasion project aimed at reducing fuel tax evasion in Kansas. The 1999 Legislature approved increases in motor fuel taxes beginning July 1, 1999, cumulating to a total increase of $0.04, which will continue until July 1, 2020.

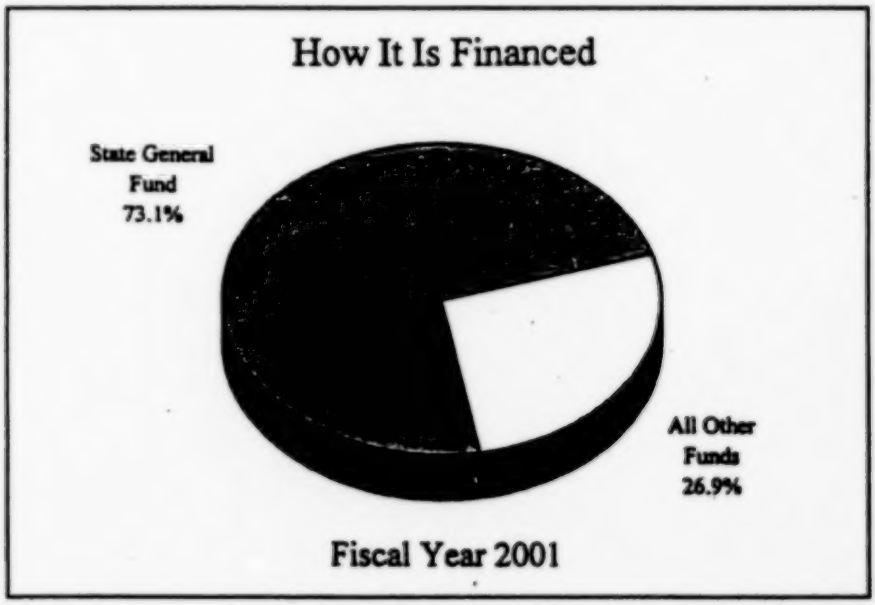


Fiscal Year	Gross Collections	Percent Change
1994	$289,021,917	6.4%
1995	$290,618,527	0.6%
1996	$301,600,919	3.8%
1997	$308,592,688	2.3%
1998	$326,475,626	5.8%
1999	$331,151,050	1.4%

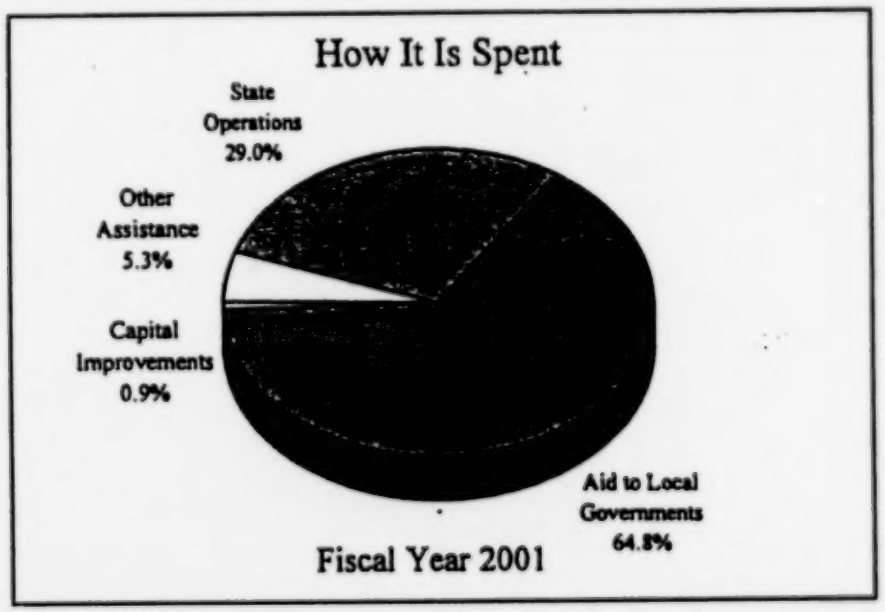
Education Summary

The Education function includes expenditures for state support of primary, secondary, and higher education. Agencies in this function are the board of Regents and the institutions under its jurisdiction; the Department of Education, including the Schools for the Deaf and blind; the Kansas public Employees Retirement System (that portion reflecting administration of retirement programs for school employees and the payment of local school employer contributions); the State Treasurer (that portion financing university bond debt service payments); the State Historical Society; the Kansas Arts Commission; and the State Library.

Total appropriations for education agencies in FY 2000 were $3,979,912,515, of which $2,896,612,762 is from the State General Fund. The appropriations for FY 2001 include $4,059,077,602, of which $2,966,522,475 is from the State General Fund. The FY 2001 amounts represent increases of 2.4 percent from the State General Fund and 2.0 percent from all funding sources over the previous year.



Elementary & Secondary Education. The Governor recommended a variety of increases in spending for elementary and secondary education of FY 2001. The Legislature agreed with the Governor in most cases and authorized a few additional expenditures. State General Fund expenditures for general state aid increase by $29.0 million in FY 2001, as demonstrated by the table on the next page. School districts will receive $3,820 in base state aid for each pupil, an increase of $50 from FY 2000. This additional $50 in the base will cost approximately $28.7 million in FY 2001. These expenditures assume a weighted FTE enrollment of 573,762 in the 2000-2001 school year. Despite a shortfall in State General Fund revenues, the Governor and Legislature fully funded the current year base state aid, also an increase of $50 per pupil, from the previous year.



The Legislature concurred with the Governor in expanding the four-year-old at-risk program by $1.0 million. This money from the children's Initiatives Fund will benefit 436 additional children. The Legislature also added monies for various programs, outlined below; however, the Legislature

did not agree with the Governor on funding the Kan-Ed Infrastructure and removed the $4.5 million which was recommended from the children's Initiatives Fund from this budget.

Several new programs were funded by the Legislature, as embodied in 2000 SB 432. Under the new mastery of Basic Skills Program, the board of Education will prepare a strategy for identifying, developing, and implementing a mastery of basic reading skills programs for kindergarten through grade three. In order to accomplish this, the Board was given $25,000 from the State General Fund. This bill also requires persons offered employment by a school district to submit to a criminal history check at the district's cost. The bill also establishes a mentor teaching program in the 2001-2002 school year. Trained mentor teachers will provide new teachers with support and assistance.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 4

AFFIDAVIT OF PAUL FENDER

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Paul Fender, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I currently perform full-time planning and construction services for the Prairie Band Potawatomi Nation (the "Nation"). I have performed services for the Nation as a construction consultant since 1996 and I am familiar with the Nation Station's construction and operations.

2. A. The total construction cost of the Nation Station was $1.5 million. The approximate construction cost of the Nation Station's motor fuel handling system for the unloading, storage, dispensing, measuring and environmental monitoring of gasoline and diesel motor fuel was over $250,000.

B. The fuel that is delivered to the Nation Station must be unloaded, stored, dispensed, measured and monitored before it can be sold. Because the fuel is highly flammable and capable of causing environmental damage, expensive tank storage and fuel handling and monitoring systems must be used by the Nation Station to make the fuel available to its customers.

3. The County and State have been substantially benefited by the Nation taking responsibility for the majority of the roads and bridges on and near the reservation. The Nation not only maintains a majority of the reservation roads but it also has improved and now maintains many off-reservation roads. The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1½ miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection. These improvements provide motor vehicle transportation access to the Nation Station and the Nation's casino. The Nation has the ongoing and future obligation to maintain this stretch of roadway access to the casino and the Nation Station.

4. The Nation itself paid for the 1997-1998 improvements to the U.S. 75 Highway and 150th Road intersection and for the improvements from the highway to its casino and the Nation Station. Therefore, the Nation, and not the State, paid for these access roads to the Nation's casino, the Nation Station and the reservation

Further affiant sayeth not.

/s/ Paul Fender
Paul Fender

Subscribed and sworn to before me this 21st day of December, 2000.

/s/ Theresa J. Kitchkommie
Notary Public

Theresa J. Kitchkommie
NOTARY PUBLIC
State of Kansas
My Appt. Expires
8-27-02

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 5

AFFIDAVIT OF JON BOURSAW

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Jon Boursaw, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Executive Director of the Prairie Band Potawatomi Nation (the "Nation"). I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, and of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation.

2. A. By building its casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. This has created a market for the Nation Station's products. The casino has generated the substantial market value of bringing consumers to the Nation Station to buy its products. The Nation Station's retail fuel business exists because of the flow of vehicle traffic to and from the casino and because of other reservation-related vehicle traffic, not because the Nation Station is selling fuel at less than fair market prices or marketing a state tax exemption. The retail price

for motor fuel at the Nation Station is generally set at the fair market price based upon competing prices of other motor fuel retailers in northeast Kansas. (See my attached March 2, 2000, letter to Jim Moulden.)

B. The Nation has generated value by financing and constructing the Nation Station and its facilities for the unloading, storage, dispensing and monitoring of gasoline and diesel motor fuel. The Nation Station is a tribally-owned and operated convenience store and gas station. The Nation Station is located on 150th Road between P and Q Road on the same U.S. trust land as the casino.

C. The Nation has generated substantial additional value by actively contributing to and managing the Nation Station as an integral part of its tribal business. The Nation Station is managed by Jon Boursaw, the Nation's Executive Director, by Jim Moulden, the Nation Station's general manager, and by Randy Conroy of the Nation's finance department. All three of them and all of the Nation Station personnel are tribal government employees. The Nation provides all of the Nation Station's personnel, accounting, financing and management.

D. As of May 25, 2000, the Nation Station employed a total of 15 persons. Eleven of the Nation Station's employees were of Indian descent, with seven of them being tribal members of the Nation. The Nation Station exercises Indian preference in its employment practices.

3. A. The Nation's tribal government provides the majority of the overall governmental services for the Nation Station, its Indian and non-Indian customers and the reservation as a whole. These tribal governmental

services include road and bridge construction and maintenance, law enforcement, fire protection and emergency medical services, child care, education, zoning, environmental protection, tribal court and many other government services. These tribal government services are also provided to the company that distributes motor fuel to the Nation Station.

B. The Nation's Fire and Emergency Medical Services Department provides fire protection, EMS first response and ambulance services for the Nation Station, its customers and all other persons on and near the reservation. In 2000 the Nation has expended or will expend $2,062,697 for these services. In 1999, the Nation expended in excess of $590,000 to pay for these services. (See attached Fire Department, Jan.-March 2000 quarterly report and budget (1999 actual and 2000 budgeted). In addition to all these expenditures, the Nation is expending $1.2 million for a special capital project to build a new fire station on K Road on the reservation between 158th and 150th Roads, which will be completed in 2001. The Tribe has mutual aid agreements with several local fire districts under which it provides fire control services to all persons on and near the reservation.

C. The Nation's government is expending over $1.0 million annually on education. The Nation's Child Care and Head Start program provides child care and early childhood development services for both Indians and non-Indians on the reservation. In 2000 the tribal expenditures for these services will be $760,798. These services are carried on principally in the Ben-no-tteh (child's house) Wigwam building, which can serve up to 74 children and employs roughly 20 tribal employees. The Nation also provides other education services for the reservation

through its Education Department, which will expend $317,547 for this purpose in 2000.

D. The Nation's Department of Planning and Environmental Protection generally provides environmental protection, zoning and land use planning regulation services for the Nation Station and all other persons on and near the reservation. In 2000 the tribal expenditures for these services will be roughly $400,000. In addition, watershed planning services of this Department include the study and management watershed resources on and near the reservation. Its land use planning services have included planning and advising on the U.S. 75 Highway Corridor Study, which includes highway usage both on and near the reservation. (A true and correct copy of the Prairie Band Potawatomi Land Use Plan excerpt, cover and pages 42-43 is attached.)

E. With respect to the casino, the Nation Station and the reservation as a whole, the Nation is currently providing the majority of overall government services for its reservation.

For each tribal government department, the 1999 actual and 2000 budgeted operating expenditures by the Nation to perform these services are as follows:

Tribal Department:	1999 Actual	2000 Budget
Alcohol and Drug Treatment	$58,853	$79,269
Attorney	77,208	192,100
Building Maintenance	287,610	257,015
Child Care Center	317,149	760,798
Community Health	80,275	138,760
Community Service Program (See Social Serv.)	54,003	122,136
USDA Food Distribution	31,304	45,662
Education (higher, adult vocational & adult)	343,149	317,547
Election Board	62,799	77,168
Enrollment	74,788	136,754
Finance Department (1999 est.)	400,000	463,969
Fire and Emergency Medical Services	591,314	2,062,697
General Administration (1999 est.)	350,000	414,440
Grant Writing	0	48,021
Human Resources	239,073	360,380
Johnson O'Malley (for education)	17,373	70,198
Land Management	246,770	416,073
Language Preservation	71,045	106,000
Law Enforcement	681,803	1,107,690
Motor Vehicles	0	53,380
Planning and Environmental Protection	400,000	400,000
Road and Bridge	1,665,707	1,856,485
Senior Citizens	145,320	199,975
Social Services	46,676	382,034
Tribal Court	103,721	314,904
Youth Program	65,536	169,358
TOTAL Tribal Government Expenditures	$6,411,476	$10,552,813

The total for these tribal government services in 2000 which benefit the Nation Station and the reservation as a whole is over $10.5 million. (A copy of the Jan.-Mar. 2000

quarterly report and budget (1999 Actual and 2000 budgeted) is attached for each of these departments.) These figures do not include tribal government capital expenditures for special projects. It is expected that the Nation's 2001 and future tribal government operating expenditures will at least equal or exceed those for 2000.

F. The tribal fuel tax revenue from the Nation Station and from other sources generates important tax revenue for the Nation's government. This tax revenue enables the Nation to provide essential governmental services to its reservation. These tribal governmental services include road and bridge construction and maintenance, law enforcement, fire protection, emergency medical, environmental and zoning services, and social welfare and other government services. The generation of tribal taxes from the Nation Station and the funding of tribal government services with them are an integral part of the self-governance, self-sufficiency and economic development of the Nation and its reservation.

5. The indirect burden of the state tax falls on the Nation's retail fuel business and interferes with the Nation's self-government right of tribal taxation. The defendant's attempted enforcement of the state fuel tax has a direct and substantial adverse impact on the Nation Station and the Nation. The Nation Station's cost of fuel with the state tax imposed would destroy its business and would make it impossible for the Nation to collect tribal fuel taxes from it. The higher retail prices that the Nation Station would be forced to charge if the state tax were imposed would put it out of business.

The application or enforcement of the Kansas motor fuel tax laws with respect [sic] motor fuel sold by the

Nation at the Nation Station would (a) infringe upon and impair the Nation's sovereign right to impose and collect tribal motor fuel taxes, (b) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for its reservation, (c) infringe upon and impair the Nation's sovereign right to self-government and self-determination and (d) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

Further affiant sayeth not.

/s/ Jon Boursaw
Jon Boursaw

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

[LOGO] Government Center
16281 Q Road • Mayetta, Kansas 66509
Ph. (785) 966-2255

March 2, 2000

Jim Moulden
The Nation Station
12285 150th Road
Mayetta, KS 66509

Re: Operations of the Nation Station.

Dear Mr. Moulden:

I have analyzed the operations [sic] the Nation Station since it opened in October of 1999. In order to maintain an adequate level of profitability, the Nation Station will need to increase its motor fuel prices to approximate this region's fair market prices. From this date forward, you are directed to sell gasoline and diesel fuels at prices equivalent to the fair market prices for which these fuels are being sold in northeast Kansas by retailers in general. The fair market price is any price within a range no more than 2 cents above or below the average price in northeast Kansas, as you may determine, from your observations of other motor fuel retailers.

As you may know, the Nation has enacted a tribal motor fuel tax in order to fund tribal government operations. This tax is 16 cents per gallon for gasoline and 18 cents per gallon for diesel fuel. Please work with the Nation's Tax Commission to assure proper reporting and payment of these motor fuel taxes to the Nation.

If you have any questions, please give me a call.

Very truly yours,

/s/ Jon Boursaw
Jon Boursaw, Executive Director
Prairie Band Potawatomi Nation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 6

AFFIDAVIT OF TIM RAMIREZ

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Tim Ramirez, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Director of the Road and Bridge Department of the Prairie Band Potawatomi Nation (the "Road and Bridge Department"). I have held this position for 18 years and have been directly involved in the design, engineering, construction and maintenance of roads and bridges on the reservation during this time. I am familiar with the road and bridge construction projects on and near the reservation.

2. The Road and Bridge Department provides most of the reservation road and bridge construction and maintenance for the Nation's 121 square mile reservation. These reservation roads provide customer and employee access to commercial and government establishments, access to the residences of both tribal members and non-members living on the reservation and access to crop lands, allotment lands and agricultural facilities. The Nation's Road and Bridge Department provides these government services throughout the reservation and

currently has responsibility for 118 miles of the 212 miles of roads on the reservation.

The number of road miles for which the Nation is responsible has steadily grown from 63 miles in 1996 to roughly 118 miles at present. The tribal government recognized the lack of proper road maintenance on the reservation and has taken on this responsibility. From 1997 to the current date, the Road and Bridge Department has also constructed seven tribal bridges on the reservation. The Nation maintains these roads and bridges with no ongoing financial assistance from the County or the State. In addition to servicing these 118 miles of roads, the Nation also has provided funds and materials to the County to help it maintain and improve other roads on the reservation.

3. For 1997 through 2005, the Nation's Road and Bridge Department has expended and will expend roughly $29,000,000 for constructing and maintaining roads and bridges on and near the reservation. This is an average of over $3.0 million per year. (See Summary of Actual and Planned Expenditures for the Tribal Road and Bridge Department for 1997-2005.)

4. The Nation not only maintains a majority of the reservation roads but it also maintains off-reservation roads near the Nation Station. The Nation maintains off-reservation roads near the Nation Station that are part of the Indian Reservation Road System, including 150th Road from P Road to U.S. 75 Highway, 158th Road from Q Road to U.S. 75 Highway, 162nd Road from Q Road to U.S. 75 Highway and Q Road from 158th Road to 162nd Road.

5. The Nation's Road and Bridge Department employs 32 persons, 31 of whom are Prairie Band tribal members. The department owns, operates and maintains a fleet of twenty-two pieces of road equipment including graders, scrapers, dump trucks and back hoes and a number of small trucks worth approximately $4 million.

6. In performing tribal government services, the Nation's Road and Bridge Department expended in excess of $1.6 million in 1999 and will expend over $1.8 million in 2000. For the current 2000 year, I have attached a copy of the Road and Bridge Department's Quarterly Report dated April 15, 2000. It describes our activities. The 1999 and 2000 budgets do not include all of the Nation's special road and bridge construction capital project expenditures.

7. A. The Nation has special project plans in the immediate future to make significant improvements and to pave seven miles of reservation roads with asphalt. On October 17, 2000, the Nation signed a contract and will pay roughly $275,000 to its engineers for design, engineering and construction work for this project. (See attached October 17, 2000 Agreement for Professional Services for the 2000 Road Reconstruction Project between Bartlett and West Engineers, Inc, and the Prairie Band Potawatomi Nation.) The additional expected cost for the construction of this project in 2001 is estimated at $1,925,000.

B. As part of its ongoing, special road reconstruction projects, the Nation anticipates that during the period of 2000 through 2005 its Road and Bridge Department will improve and pave 30 of [sic] miles of reservation roads as follows:

Year	Reservation Road Miles	Roads planned to be improved and saved	Nation's Expected Cost
2001	7	See attached map, yellow code.	$1,925,000
2002	5	See attached map, green code.	1,375,000
2003	7	See attached map, blue code.	1,925,000
2004	6	See attached map, orange code.	1,650,000
2005	5	See attached map, pink code.	1,375,000
Total Expected Cost @ $275,000/mile:			$8,250,000

(See attached Prairie Band Potawatomi Roadway Improvement Map, 2000-2004. The map is almost one year out of phase because the Nation decided to delay these projects for more extensive reengineering and reconstruction of the reservation roads using federal design standards.)

The total expected cost to the Nation for these special road reconstruction projects is $8,250,000.

8. In addition to the above special projects, the Nation has agreed to finance significant costs for a project to improve the off-reservation intersection at 150th Road and U.S. 75 Highway. The Nation has signed a written agreement to pay roughly $450,000 of tribal funds to subsidize additional improvements to this intersection. The Nation will be financing the engineering, right of way and utility relocation costs for this project. (See attached Cooperative Agreement dated December 8, 1999.)

10. The tribal motor fuel tax revenue paid by the Nation Station has been used by the Nation's Road and Bridge Department to help finance our governmental functions of constructing and maintaining roads, bridges and rights-of-way on or near the Nation's reservation, as required by PBP Code §10-6-7.

11. The statements made on my attached April 15, 2000 letter are true and correct.

12. A. Mr. Lackey's affidavit is inaccurate and misleading in many respects. It is my understanding that the system enhancement improvements near the reservation are only for the U.S. 75 Highway and 150th Road intersection. Their total costs for this single, one-time project are $5,000,000 and not the $13,796,612 figure stated in Mr. Lackey's affidavit, ¶6. (See attached Cooperative Agreement dated December 8, 1999.) The State's share of these expenditures should not generally be attributed to the Nation's reservation when they are being made for many other reasons unrelated to the reservation and their proportional benefit to the reservation is relatively small after payment of the tribal $450,000 share.

B. The 1992-1994 improvements to U.S. 75 Highway between Topeka and Holton were principally made during those years to widen the high speed, limited access U.S. 75 Highway from two to four lanes. This U.S. 75 Highway is a major north-south highway having the principal purpose of providing a roadway for through auto and truck traffic. It is misleading for Mr. Lackey to suggest that the 1992-1994 expenditures should be attributed to the Nation's reservation. These expenditures should not generally be attributed to the Nation's reservation when they were made for many other reasons unrelated to the reservation and their proportional benefit to the reservation is relatively small.

C. The portions of U.S. 75 Highway which Mr. Lackey discusses in his Affidavit do not provide highway access to the casino or Nation Station. Access is provided by 150th Road.

D. The State receives a large amount of federal highway money and it is misleading for Mr. Lackey to suggest that all of the financing for state road projects comes from the State.

13. In my opinion, Mr. Bruns has not been "instrumental" in reservation road and bridge construction and maintenance given the fact that the Nation's Road and Bridge Department is the primary government agency that conducts these activities on the reservation.

Further affiant sayeth not.

/s/ Tim Ramirez
Tim Ramirez

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

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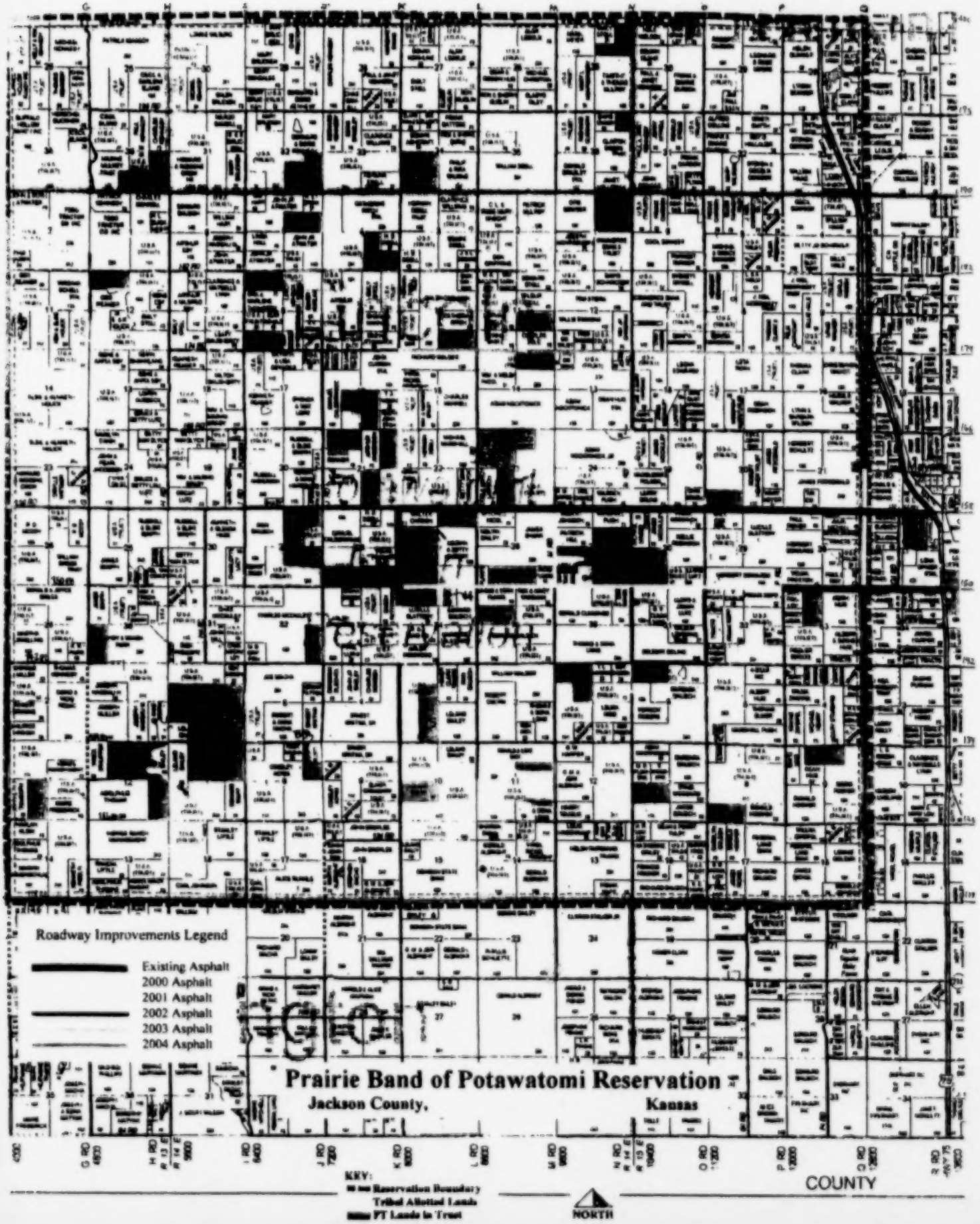

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 9

AFFIDAVIT OF JIM MOULDEN

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Jim Moulden, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the store manager of the Prairie Band Potawatomi's Nation Station and have been in this position from September 1999 to the present.

2. The Nation Station's fuel prices are set at fair market. Soon after it was opened, the Nation Station was "directed to sell gasoline and diesel fuels at prices equivalent to the fair market prices for which these fuels are being sold in northeast Kansas by retailers in general." Consequently, the Nation Station sells its motor fuel products at fair market prices.

3. The Nation Station generally advertises that it has "competitive prices" for fuel. At one time it had a single billboard sign that advertised the "lowest gas prices around." This was intended to convey the message, consistent with its general business practice in ¶2, that the Nation Station also attempts to meet the fuel prices of the other two retailers on the reservation. At any one time, the actual fuel prices of the Nation Station may be higher or lower than the other two retailers, depending in large part

on the cost that the Nation Station pays to obtain the fuel and the prices of other retailer's in northeast Kansas.

4. The statements made in my attached June 26, 2000 letter to Dr. Pflaum are true and correct.

Further affiant sayeth not.

/s/ Jim Moulden
Jim Moulden

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

Prairie Band Potawatomi Nation

Nation Station
12285 150th Road
Telephone: (785) 966-2719 Fax: (785) 966-2987

June 26, 2000

Dr. Christopher Pflaum
Spectrum Economics. Inc.
40 Corporate Woods, Suite 360
9401 Indian Creek Pkwy.
Overland Park, KS 66210

Re: Prairie Band Potawatomi Indians v. Pierce, Case No. 99-4071-DES, motor fuel tax litigation.

Dear Dr. Pflaum:

This letter provides you with some information in writing about the Nation Station. The Nation Station first opened for business on September 30, 1999. The Nation Station is a modern 8400 square foot convenience store located adjacent to the Nation's casino. We sell gasoline and diesel fuel and other products that are typical for a convenience store. Prices for gasoline and diesel fuel are set at the Nation Station in accordance with Mr. Boursaw's March 2, 2000 letter to me, a copy of which is attached.

The Nation Station is the only "fast food" outlet on the reservation or within 2 miles of the government center. It serves approximately eighty meals per day to members of the Nation and reservation workers and casino workers and patrons. In addition, it is the only motor fuel station owned by the Nation serving its 121 square mile reservation.

The Nation Station faces numerous competitors past which casino customers travel and who advertise their prices in signage visible from US 75 Highway. These stations include: the Indian Country General Store at 19075 US 75 Highway (on US 75 near 190th Road) and the Indian Country Mini Mart at 20330 US 75 Highway (1½ miles north of the Indian Country General Store), both of which are in Jackson County, and the Kickapoo station and the Sac and Fox station, both of which are on US 75 just north of Jackson County in Brown County. In addition to these stations, customers traveling from Topeka also pass numerous stations before entering US 75 and several are located on US 75 between the Kansas River and Mayetta.

With regard to diesel fuel, the Nation Station is not signed up with any of the major fuel card operations, such as Comdata, T-Chek, etc., and it does not have a Trendar or other system to take their cards as payment for diesel fuel.

Very truly yours,

/s/ Jim Moulden
Jim Moulden
Nation Station Manager

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, Defendant.
No. 99-4071-JAR.
Jan. 15, 2003.

Indian tribe brought action for declaratory and injunctive relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. State moved for summary judgment. The District Court, Robinson, J., held that: (1) Court had jurisdiction to hear tribe's claim; (2) tribe had standing to bring action; (3) Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; (4) state was not barred by federal preemption from imposing tax; (5) tribe's interest in raising revenues did not outweigh state's interests; and (6) Kansas Act for Admission did not bar imposition of tax.

Motion granted.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Robinson, District Judge.

This action is before the Court on defendant's Motion for Summary Judgment (Doc. 49). Plaintiff has filed a Response (Doc. 59) and defendant has filed a Reply (Doc. 68). The Court has reviewed the parties' filings and is now prepared to rule.

I. FACTS

The following facts are taken from the record and are either stipulated, uncontroverted or viewed in the light most favorable to plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents. The Court also disregards conclusory statements.

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Once the fuel arrives on the reservation, the Nation Station unloads, stores, monitors and dispenses the fuel. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales.

The Tribe imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. The Nation Station is subject to $300,000 in tribal fuel taxes per year. The Tribe spends revenue from the fuel tax to construct and maintain roads, including the road leading from U.S. Highway

[1] 25 U.S.C. § 2701 *et seq.*

75 to the Tribe's casino and other roads on and near the reservation. The Tribe also provides government services including law enforcement, fire protection, emergency services, education services, urban planning, court services and other miscellaneous services. Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands. Then, in 1995, the Kansas legislature amended the Kansas Motor Fuel Tax Act[2] and the Department of Revenue began to impose fuel tax on fuel distributed to Indian tribes on tribal land. The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[4] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[5] A "genuine"

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

[4] Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993).

[5] *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

factual dispute requires more than a mere scintilla of evidence.[6]

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.[7] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[8] The nonmoving party may not rest on its pleadings but must set forth specific facts.[9]

"[The court] must view the record in a light most favorable to the parties opposing the motion for summary judgment."[10] Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative.[11] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[12]

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[6] *Id.* at 252, 106 S.Ct. 2505.

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir.1991).

[8] *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991).

[9] *Applied Genetics*, 912 F.2d at 1241.

[10] *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

[11] *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

[12] *Id.* at 251-52, 106 S.Ct. 2505.

III. DISCUSSION

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claims that the Indian Commerce Clause,[13] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[14] or other federal law prohibits imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. Defendant asserts that summary judgment should be granted because the State is entitled to Eleventh Amendment immunity,[15] the Tribe lacks standing, and the Hayden-Cartwright Act provides congressional consent for imposition of the State's fuel tax.[16] Defendant also asserts that there is no material issue of fact concerning whether the state fuel tax is preempted by federal law, whether the state fuel tax improperly infringes upon the Tribe's sovereign right to self-government, or whether the Kansas Act for Admissions bars imposition of the tax. The Court will take each of defendant's contentions in turn.

A. Jurisdiction and the Eleventh Amendment

The Tribe asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1362,[17] which grants

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[13] U.S. CONST. art. I, § 8 cl. 3.

[14] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[15] U.S. CONST. amend. XI.

[16] 4 U.S.C. § 104.

[17] The Tribe also claims jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331.

district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Defendant argues that despite the grant of jurisdiction in § 1362, the Eleventh Amendment bars the Tribe's claims. Defendant also asserts that *Ex parte Young*,[18] a legal fiction created to overcome the Eleventh Amendment's bar under certain circumstances, is inapplicable in this case. As discussed below, defendant's arguments are unfounded.

The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe.[19] In *Ex parte Young,* the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers, sued in their official capacity, to enjoin an alleged ongoing violation of federal law.[20] Defendant contends that the *Ex Parte Young* exception is inapplicable in this case because the relief being sought by the Tribe implicates special sovereignty interests.

[18] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[19] *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

[20] *Ex parte Young,* 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young*).

Defendant points to the Supreme Court case *Idaho v. Coeur d'Alene Tribe of Idaho*,[21] wherein the Court ruled that the *Ex parte Young* exception could not be entertained when the relief requested would be as much of an intrusion on state sovereignty as an award of money damages. In *Coeur d'Alene,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment to submerged lands located within the boundaries of the Coeur d'Alene Reservation.[22] The tribe also sought injunctive relief against various state officials to prevent them from exercising regulatory jurisdiction over the submerged land. The Court determined that the tribe's claims were the functional equivalent to a quiet title action and if relief was granted, it would have divested the state of substantially all regulatory power over the land at issue.[23] Thus, the Court found that the requested relief would affect Idaho's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," defeating plaintiff's *Ex parte Young* action.[24]

Soon after the Supreme Court's *Coeur d'Alene* decision, the Tenth Circuit decided *ANR Pipeline Co. v. Lafaver*,[25] where it held that the states' power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests, defeating an *Ex parte Young* action. In so holding, the Tenth Circuit interpreted *Coeur d'Alene* as requiring a new two-step analysis for determining whether *Ex parte Young* applies

[21] 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[22] *Id.* at 264-65, 117 S.Ct. 2028.

[23] *Id.* at 265, 117 S.Ct. 2028.

[24] *Id.* at 287, 117 S.Ct. 2028.

[25] 150 F.3d 1178, 1193 (10th Cir.1998).

in any given case. According to *ANR Pipeline,* federal courts are to first "examine whether the relief being sought against a state official implicates special sovereignty interests."[26] If the answer to the first inquiry is affirmative, the court "must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment."[27]

Relying on *Coeur d'Alene* and the *ANR Pipeline,* defendant asserts that an *Ex parte Young* action does not apply in this case because the relief sought by the Tribe implicates special sovereignty interests in the State's system of taxation and the requested relief would be the functional equivalent to money damages against the State. The Court finds defendant's reliance on these cases is misplaced. To rule otherwise would be to ignore the long line of cases decided in federal court relating to state taxation on tribal affairs.[28] As the Ninth Circuit pointed out in *Agua Caliente Band of Cahuilla Indians v. Hardin,*[29] "in the context of state taxation of *tribes,* there are preemption considerations and *competing* sovereignty interest, the merits of which are governed by a long line of cases." The issues presented by state taxation of tribal

[26] *Id.* at 1190 (citations and quotations omitted).

[27] *Id.*

[28] *See e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Moe v. Confederated Salish and Kootenai,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[29] 223 F.3d 1041, 1048 (2000).

interests were not present in either *ANR Pipeline* or *Coeur d'Alene,* both of which have been limited to their particular facts.[30] Thus, the Court finds that an *Ex parte Young* action is appropriate under the circumstances of this case.

In the alternative, the Tenth Circuit has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. § 1362, may seek injunctive relief from state taxation in federal court.[31] In *Sac and Fox,* the Tenth Circuit contemplated, under a set of facts very similar to those at hand, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Kootenai Tribes,*[32] the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, barred the tribes' suit.[33] The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida v.*

[30] *Robinson v. Kansas,* 117 F.Supp.2d 1124, 1136-37 (D.Kan.2000) (noting that Tenth Circuit has made it clear that finding a special sovereignty interest such as those found in *ANR Pipeline* and *Coeur d'Alene* is the exception not the rule) (citing *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir.1998); *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th Cir.1998); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998); *Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir.1998); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999).

[31] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 571-73 (10th Cir.2000). *See also Sac and Fox Nation of Missouri,* 979 F.Supp. 1350, 1352-53 (D.Kan.1997).

[32] 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding an Indian tribe's right to seek injunctive relief from state taxation in federal court).

[33] *Sac and Fox,* 213 F.3d at 572.

Florida,[34] finding that the *Seminole Tribe* Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from state taxation.[35] Based on the *Moe* decision, the Tenth Circuit reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of the Kansas fuel tax case.[36] Like the Tenth Circuit, this Court asserts jurisdiction under § 1362 and finds the Eleventh Amendment does not bar this suit.

As instructed by the Tenth Circuit in *Sac and Fox,* this Court has jurisdiction and the Eleventh Amendment does not bar the Tribe's claim brought pursuant to § 1362. Further, based on the legal fiction created in *Ex parte Young,* the Court finds that it has jurisdiction to hear this dispute. Therefore, summary judgment is not appropriate based on the State's Eleventh Amendment immunity.

B. Standing

Under Article III, § 2 United States Constitution, Federal courts have jurisdiction to hear a matter only if an actual "case or controversy" exists.[37] In determining

[34] 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Article I of the United States Constitution, including the Indian Commerce Clause, does not provide sufficient authority for Congress to abrogate that State's Eleventh Amendment immunity).

[35] *Sac and Fox,* 213 F.3d at 571 (citing *Blatchford,* 501 U.S. at 784, 111 S.Ct. 2578).

[36] *Sac and Fox,* 213 F.3d at 572.

[37] U.S. CONST. art. III, § 2.

whether a case or controversy exists, the Court must evaluate whether the Tribe has standing to sue.[38]

As stated by the Tenth Circuit in *Sac and Fox,* the Constitutional standing question addresses "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant its invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on its behalf."[39] To meet the standing requirement, the Tribe must allege "1) a concrete and particularized actual or imminent injury, 2) which is fairly traceable to the defendant's conduct, and 3) which a favorable court decision will redress."[40] In addition to the above mentioned requirements, the Supreme Court has enunciated several other prudential standing requirements. First, a plaintiff must assert its own rights and not those of others.[41] Next, a plaintiff will not meet the standing requirement if he or she asserts a "generalized grievance shared by a large class of citizens."[42] Finally, the interest which a plaintiff wants protected must be within the "zone of interests to be protected by the statute or Constitutional guarantee."[43]

[38] *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[39] *Sac and Fox,* 213 F.3d at 573 (citations and quotations omitted).

[40] *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville,* 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)).

[41] *Id.* at 573 (citing *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

[42] *Id.* (quoting *Warth,* 422 U.S. at 499, 95 S.Ct. 2197).

[43] *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)).

Defendant argues that the Tribe lacks standing to bring this case because the tax in question falls on the distributors, not the Tribe.[44] The Court finds that the Tenth Circuit's decision in *Sac and Fox* settles this issue.

Addressing the exact arguments made by defendant here, the *Sac and Fox* court held that a tribe has standing to sue a state in federal court where the tribe alleges particularized imminent economic injury due to the state's imposition of the fuel tax.[45] In *Sac and Fox,* the state alleged that the tribes did not have standing to bring suit challenging the Kansas motor fuel tax because the legal incidence of the tax falls on the distributors of the fuel rather than on the tribal retailers. The court rejected this argument stating that the court had "little difficulty concluding that the Tribes [have] constitutional standing to maintain their suit against the State."[46]

Like the tribes in *Sac and Fox,* the Tribe here meets the standing criteria to challenge the State's fuel tax.[47] First, the Tribe provides affidavits claiming injury including

[44] *See Sac and Fox,* 213 F.3d at 580 (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

[45] *Id.* at 573-74. The Court acknowledges that the case cited by defendant, *Carter v. Montana Dept. of Transp.,* 274 Mont. 39, 905 P.2d 1102 (1995), where the court held a fuel retailer did not have standing to challenge the state fuel tax when the legal incidence of the tax falls on the distributor, is somewhat in contrast to the Tenth Circuit's decision in *Sac and Fox.* Despite the value of the case to defendant's position, the Court finds it is bound by Tenth Circuit precedent, not by Montana Supreme Court precedent. Further, the *Carter* case can be distinguished because the gas station in question was not tribally owned and the case was not brought by the tribe, it was brought by an individual Indian.

[46] *Sac and Fox,* 213 F.3d at 573.

[47] *See id.* at 573-74.

interference with the right of self government and economic injury caused by the state fuel tax. Next, the alleged injury is directly traceable to the State's desire to impose a fuel tax,[48] in that the Act allows the tax to be passed on directly to the retailers.[49] Finally, deciding in favor of the Tribe will redress the alleged injury because if the distributors who distribute fuel to the Nation Station are not required to pay the tax, there will be no threat of passing the tax through to the Tribe.[50]

Further, like in *Sac and Fox,* the prudential standing principles discussed above do not bar the Court's exercise of jurisdiction.[51] First, the Tribe asserts its own rights to be free from the cost of motor fuel tax. The fact that the consumers and fuel distributors will unquestionably benefit if the Tribe is successful in challenging the tax, does not alter the Court's analysis.[52] Next, because the Tribe has asserted its right to be free from the fuel tax, it is not asserting a "generalized grievance" prohibiting the Court from exercising jurisdiction.[53] Finally, the Tribe's alleged economic interest in being free from taxation is arguably within the "zone of interest" that federal law seeks to protect.[54] In grappling with the "zone of interest" prudential requirement for standing, the Tenth Circuit noted that federal law has long sought to "protect tribal

[48] *Id.* at 574.

[49] *See* Kan. Stat. Ann. § 79-3409.

[50] *Sac and Fox,* 213 F.3d at 574 (citing Kan. Stat. Ann. § 79-3409).

[51] *See id.*

[52] *See id.*

[53] *Id.*

[54] *Id.*

self-government from state interference, including state taxation."[55]

Based on the above analysis, the Court finds that the Tribe has demonstrated that it has standing to bring this action in federal court. Therefore, summary judgment will not be granted on defendant's challenge to the Tribe's standing.

C. Hayden-Cartwright Act, 4 U.S.C. § 104

Defendant argues that pursuant to the Hayden-Cartwright Act, 4 U.S.C. § 104, Congress consented to the states' power to tax fuel distributions to Indian tribes, leaving the Tribe without recourse to challenge the tax. In pertinent part § 104(a) of the Act states:

> All tax levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military *or other reservations*, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State

[55] *Id.* (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

> . . . within whose borders the reservation may be located.[56]

The State argues that the phrase "other reservations" includes Indian lands and that the term "licensed trader" specifically refers to tribal retailers. The Tribe counters that the Act is ambiguous and that ambiguity should be construed in favor of Indian sovereignty. Unfortunately, the Court is left with little guidance from the Circuit Courts or the Supreme Court in determining whether Congress intended the phrase "other reservations" to include Indian reservations.[57] Only the Idaho Supreme Court and the United States District Court for the District of Idaho have struggled with this difficult issue.[58] Although the Court is not bound by either of these decisions, the Court finds the decisions persuasive and holds that the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.

The Court begins its analysis by noting that a state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.[59] Because of the "unique trust relationship" between

[56] (Emphasis added).

[57] *Sac and Fox*, 213 at 576 ("Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands.")

[58] *Coeur D'Alene Tribe v. Hammond*, 224 F.Supp.2d 1264 (D.Idaho 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 136 Idaho 53, 28 P.3d 996 (2001), *cert denied*, 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002).

[59] *See County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(Continued on following page)

the United States and Indian Nations, statutes that affect Indians are to be "construed broadly, with any ambiguous provision to be interpreted to their benefit."[60] Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians.[61]

Defendant argues that the language in the Hayden-Cartwright Act expressly approves state taxation of fuel delivered in Indian country. The Tribe argues that Congress did not expressly approve state taxation of motor fuel on Indian reservations and that the statute is, at best, ambiguous. Thus, the Tribe argues that the statute must be construed in favor of the Tribe and interpreted so as to not grant such taxing authority. Following the principles elucidated above, the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country. Defendant argues that the language in the Act, which allows for state taxation of motor fuels sold on

("['A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservations Indians.") (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory.")

[60] *Hammond*, 224 F.Supp.2d at 1268 (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *McClanahan*, 411 U.S. at 174, 93 S.Ct. 1257).

[61] *Hammond*, 224 F.Supp.2d at 1268.

"United States military or other reservations,"[62] includes Indian reservations. The Court is not persuaded by defendant's argument. As noted by United States District Court for the District of Idaho in *Hammond*, the term "reservation" has broad meaning and may or may not include Indian reservations.[63] The *Hammond* court explained that the term reservation has been used in land law to describe any body of land which Congress has reserved from sale.[64] The term has also been used to describe "military bases, national parks and monuments, wildlife refuges, and federal property."[65]

Additionally, as articulated by the Idaho Supreme Court in *Goodman Oil*, if Congress intended to include Indian lands in the pertinent part of the statute, § 104(a), it would have done so. The Act uses the phrase "Indian Lands or other federal reservations" in section three and the phrase "Indian reservation roads" in section six.[66] Congress's use of these distinct phrases convinces this Court that Congress could have specified that the entire Act was to apply to Indian reservations or Indian lands but did not. Therefore, by not using the word "Indian Reservation" in the applicable part of the Act, § 104(a), the language of the Act does not clearly show that Congress intended to allow state taxation of tribal fuel.[67]

[62] 4 U.S.C. § 104(a).

[63] *Hammond*, 224 F.Supp.2d at 1269.

[64] *Id.* (quoting *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

[65] *Id.*

[66] *See Goodman Oil*, 28 P.3d at 1000.

[67] *Id.*

Defendant also argues that the use of the term "licensed traders" equates to Indians or Indian traders, lending support for the position that Congress intended to allow states to tax in Indian country. The Court disagrees with defendant and finds that use of the term "licensed traders" is also ambiguous and therefore does not support defendant's position that the Act expressly grants states the authority to tax fuel on Indian reservations. As noted by the *Goodman Oil* court, at the time the Hayden-Cartwright Act was passed, the term licensed traders could have meant licensed sellers of malt beverages, licensed retailers on government reservations or licensed traders selling goods on all government reservations.[68] So, once again the term used by Congress is too broad to have the effect of conveying upon states the right to tax Indians. Congress could have used the term licensed Indian traders had it meant to grant states the authority to tax fuel on Indian reservations.

Defendant also urges the Court to resolve any ambiguities in the language of the Act by turning to the Act's legislative history and the executive interpretation of the Act. Defendant insists that the Court is required to defer to agency interpretation of a statute as required by the Supreme Court's decision in *Chevron U.S.A., Inc v. Natural Resources Defense Council.*[69] Defendant argues that the stated purpose of the statute, and two agencies' interpretations show, that the Act applies to Indian reservations.

[68] *Id.* (citing *Falls City Brewing Co. v. Reeves*, 40 F.Supp. 35 (D.Ky.1941)).

[69] 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Again, the Court disagrees. The Court will address defendant's arguments regarding the legislative history and agency interpretation in turn.

First, defendant draws the Court's attention to legislative history explaining the intended purpose of the Act. The purpose of the Act, which was passed in 1936, was to fund the extension of highway construction and maintenance. Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations. The legislative history discussing the purpose of the Act never specifically refers to Indian reservations.[70] Instead, the legislative history only discussed the inequities of selling gasoline free of state tax in "post exchange stores" and "government reservations." Once again, defendant contends that the use of the term government reservations was meant to include Indian reservations. As discussed above, the Court is not convinced that the use of the term "government reservations" includes Indian reservations. Further, as noted by the *Hammond* court, simply because Congress expressed its intent to give up the federal government's exemption from state motor fuel taxes, does not mean Congress was willing to sacrifice the Indians' exemption from the tax as well.[71]

Next, defendant calls the Court's attention to the opinions of the Attorney General and Solicitor of the

[70] *See* 80 CONG. REC. 8, 8701 (remarks of Congressman Whittington) ("In post exchange stores and on government reservations, gasoline and motor fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States. . . .").

[71] *Hammond*, 224 F.Supp.2d at 1269.

Department of Interior, alleging that the opinions clarify any ambiguity contained in the language of the statute Four months after the Act was passed in 1936, the Attorney General stated that the Act applied to a "military reservation, or an Indian reservation. . . ."[72] Also, the Solicitor of the Department of the Interior concluded that the Act authorizes state taxation of sales of motor fuel purchased on a reservation for tribal enterprise for resale both to non-Indians and members of the tribe.[73]

These statements suggest that the Attorney General and the Solicitor of the Department of Interior believed that the Act applied to Indian reservations, but as discussed in *Goodman Oil,* these statements are not sufficient to clarify the ambiguities contained in the Act.[74] The Attorney General Opinion of 1936 dealt with whether national parks fell within the Act and mentions "Indian Reservations" in passing.[75] The entire passage reads "some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations and that section does not expressly mention national parks."[76] The qualifier of "apparently" lends weight to this Court's conclusion that the Attorney General's interpretation is ambiguous.

The opinion of the Solicitor of the Department of the Interior is equally ambiguous. Referencing the Act, the

[72] 38 U.S. Op. Atty Gen. 522, 524 (1936).

[73] Application of Federal and State Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 138-40 (1940).

[74] *Goodman Oil,* 28 P.3d at 1000-01.

[75] *See id.*

[76] 38 U.S. Op. Atty Gen. 522, 524 (1936).

Solicitor said "[i]t is not clear, however, whether the Government agencies specified are intended to include such federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations."[77] While the Solicitor eventually concluded that the taxes could be levied in the circumstances before him, his statement shows that he also found the Act ambiguous.

Further, as noted in *Goodman Oil* and *Hammond,* Congress has recently attempted to pass legislation to authorize the state taxation of fuel sales on Indian reservations.[78] Such an attempt was apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations. If Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.

Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. The Court is further not persuaded by defendant's arguments relating to the legislative history or subsequent agency interpretation of the Act. Because Congress must be explicit if it intends to grant states the power to tax within Indian country, and because the Court finds Hayden-Cartwright does not provide for an explicit

[77] 57 Interior Dec. 129 at 138 (1940).

[78] *Hammond,* 224 F.Supp.2d at 1269 (citing H.R. No. 3966, 105th Cong.2d Sess. (1998); S. 550 106th Cong. (1999)); *Goodman,* 28 P.3d at 1001.

grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations, defendant's request for summary judgment on this issue is denied.

Because the Hayden-Cartwright Act is not a basis for summary judgment and because there is no jurisdictional bar preventing the Court from moving forward, the Court must now turn to the merits of the case.

D. Preemption and Tribal Self-Government

Two separate but distinct doctrines pose a barrier to the assertion of state taxation over transactions occurring on reservation land: federal preemption and tribal rights to self-government.[79] These doctrines manifest themselves from the broad authority given to Congress to regulate tribal affairs under the Indian Commerce Clause and from "the semi-independent" position of Indian tribes.[80] The Tribe asserts these doctrines bar the State from imposing its motor fuel tax on fuel delivered to the reservation. The Court is required to analyze the barriers posed by these doctrines independently because either doctrine, standing alone, can be a sufficient basis for holding that Kansas's motor fuel tax is invalid as it relates to fuel delivered to the Tribe's reservation.[81]

[79] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[80] *Id.*

[81] *Id.*

1. Preemption

It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country.[82] If, however, the legal incidence of the tax rests on non-Indians, as it undisputably does here, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy."[83] Because the legal incidence of the Kansas motor fuel tax falls on non-Indians, the Court is required to determine if a material issue of fact exists as to whether the balance of the federal, state and tribal interests tilt in favor of the Tribe. The Court must grant defendant's motion for summary judgment if the Court finds the evidence favoring the State's interest in imposing the motor fuel tax is so one-sided that defendant is entitled to prevail as a matter of law.[84]

Ordinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in

[82] *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians.' ").

[83] *Chickasaw Nation,* 515 U.S. at 459, 115 S.Ct. 2214.

[84] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

favor of the state.[85] In *Washington v. Confederated Tribes of the Colville Indian Reservation,* the Supreme Court held that while federal policy seeks to foster tribal self-government and economic development, it does not preclude state taxation of sales by Indians to nonmembers of the tribe.[86] In so holding, the Court announced that tribes cannot assert an exemption from state taxation by "imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises."[87] The Court reasoned that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts. . . ."[88]

The Tribe asserts that the rules set forth in *Colville* are inapplicable in this case because unlike the customers who were drawn to the smokeshops to avoid state cigarette tax in *Colville,* gas purchasers are drawn to the Nation Station because of its close proximity to the casino, a tribally owned and operated endeavor. The Ninth Circuit was presented with a similar argument in *Salt River Pima-Maricopa Indian Community v. Arizona.*[89] In that case, the tribe argued that the rules set forth in *Colville* only apply in cases where a tribe attempts to create a "magnet" effect of drawing customers on to the reservation by offering a lower sales tax rate than the state. The court cast serious doubt on the tribe's attempt to read *Colville* so

[85] *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 737 (9th Cir.1995).

[86] 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

[87] *Id.*

[88] *Id.*

[89] 50 F.3d 734.

narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent. According to the *Salt River* court, the most important factors in determining that the state tax was not preempted by federal law was that the goods and services sold were non-Indian, the legal incidence of the tax falls on non-Indians and the state provided most of the governmental services to those who bear the ultimate economic burden of the state tax.[90] Likewise, in the case before the court, the legal incidence of the tax falls on non-Indians, the Tribe is importing a non-Indian product[91] and selling the product mostly to non-Indians and those who bear the ultimate economic burden of the fuel tax, the consumers, are provided governmental services by the state.[92]

While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are

[90] *Id.* at 737.

[91] The court rejects the implication that fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include the proper facilities for unloading, storage, and dispensing of gasoline. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 800 F.2d 1446 (9th Cir.1986) (rejecting the tribe's assertion that *Colville* is inapposite where the tribe markets cigarettes as part of a legitimate business enterprise, where residents and visitors take advantage of other amenities offered by the tribe).

[92] *See Sac and Fox,* 213 F.3d at 584 (stating that the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer"). As discussed below in section D.2., the court rejects the Tribe's argument that it bears the ultimate economic burden of the fuel tax.

imported from off-reservation for sale to non-Indians.[93] The State's interest in raising revenues is strongest when, as here, non-Indians are taxed, and those taxes are used to provide the taxpayer with government services.[94] Based on the foregoing analysis, it is clear that the preemption balance unmistakably tips in favor of the State. Thus, summary judgment shall be granted as to the Tribe's claim arising under federal preemption.

2. Tribal Self-Government

The Tribe also asserts that imposition of the state fuel tax infringes on the Tribe's sovereign right to impose tribal fuel taxes, infringes upon the Tribe's sovereign right to finance and provide essential government services, infringes upon the Tribe's sovereign right to self-government and self-determination, and infringes upon the Tribe's right to conduct business and to economically develop its reservation. "The doctrine of tribal self-government, while constituting an independent barrier to the assertion of state taxing authority over activities taking place on tribal reservations, bears some resemblance to that of federal

[93] *Salt River,* 50 F.3d at 739.

[94] The Tribe has asserted that eleven percent of its fuel sales are derived from sales to reservation residents, tribal government employees and other persons who work on the reservation. The Tribe has not asserted that a majority or even a substantial portion of its fuel sales are made to reservation residents, those who primarily reap the benefits of tribal government services. It cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel. In addition, the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway that leads to the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation.

preemption."[95] Application of this doctrine requires the Court to weigh both state and tribal interests in raising revenue to provide taxpayers with essential government services.

The Tribe's interest in raising revenues to support essential tribal services is strongest when "the revenues are derived from *value generated on the reservation* by activities involving the Tribes *and* when the *taxpayer is the recipient of tribal services.*"[96] Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.[97]

The Tribe asserts that the revenues derived from the fuel sold at the Nation Station are a result of value generated on Indian lands because the casino, operated in close proximity to the gas station, generates a flow of motor vehicle traffic. The Tribe contends that the gasoline market exists because of the nearby casino, not simply because patrons can purchase gas free from state motor fuel tax. Assuming the Tribe can show that they are marketing a product, the value of which is derived on reservation land, the Tribe cannot show that those who

[95] *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404, 1412 (9th Cir.1992) (citing *White Mountain Apache Tribe,* 448 U.S. at 142, 100 S.Ct. 2578).

[96] *Colville,* 447 U.S. at 156-57, 100 S.Ct. 2069 (emphasis added).

[97] *Salt River,* 50 F.3d at 738.

ultimately take on the economic burden of the tax, the consumers, are the recipients of tribal services as opposed to state services.[98]

The Tribe proposes that the ultimate economic burden of the tax does not fall on the consumers but rather it falls on the Tribe. The Tribe bases this assertion on the presumption that the tax will destroy the Nation Station's business by burdening the Nation Station with double taxation and interfering with the Tribe's right to impose tribal taxes and to finance its government. The Court cannot agree for several reasons.

First, in *Sac and Fox,* the Tenth Circuit held that even though the legal incidence of the Kansas motor fuel tax falls on the fuel distributors, the ultimate, albeit indirect, economic burden of the Kansas motor fuel tax falls on the consumer.[99] Thus, according to the Tenth Circuit, if the Tribe can show that the ultimate economic burden falls on tribal members as the consumers of the fuel, the tax improperly interferes with internal tribal affairs.[100] Such a showing would require the Tribe to produce evidence that a substantial portion of the Tribe's retail fuel sales are to tribal members. The Tribe cannot make the required

[98] *See Sac and Fox,* 213 F.3d at 584 (stating the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer").

[99] *Sac and Fox,* 213 F.3d at 584. *See also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 607-10, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (holding that the legal incidence of the tax does not always fall upon the entity legally liable for payment of the tax); *Chickasaw Nation v. Oklahoma Tax Comm'n,* 31 F.3d 964, 972 (10th Cir.1994) (noting that the "question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.").

[100] *Id.*

showing as their own evidence indicates that only a small percentage of the retail fuel sales are made to tribe members. The Tribe presents evidence indicating that seventy-three percent of the fuel sold at the Nation Station is sold to casino patrons and only eleven percent of the fuel sales are made to persons who live or work on the reservation. Although the Tribe certainly provides substantial services to those persons who live and work on the reservation, that group of persons constitutes only a small portion of the consumers who purchase fuel at the Nation Station. The majority of the fuel consumers are not members of the Tribe and are thus recipients of state services.[101]

Second, the Tribe's contention that the state fuel tax and the tribe's fuel tax cannot coexist because the result will be double taxation and an increase in the product's cost must also be rejected. There is no question that the Tribe's power to tax transactions occurring on trust lands "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . ."[102] But, a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business.[103]

[101] The Court recognizes that the Tribe provides some governmental services to non-Indian purchasers by constructing and maintaining reservation roads and providing police protection. But, it cannot be disputed that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation.

[102] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069.

[103] *Id.* at 154-158, 100 S.Ct. 2069. *See also Gila River Indian Cmty.,* 91 F.3d 1232, 1239 (9th Cir.1996) ("The State and Tribe have concurrent taxing jurisdiction . . . [a]ccordingly, the Tribe's tax program is not undermined by the state tax.").

Further, any negative economic impact on the Tribe by the imposition of the state fuel tax is not necessarily sufficient to invalidate the tax.[104] Indeed, the state may sometimes impose a "non-discriminatory tax on non-Indian consumers of Indian retailers doing business on the reservation . . . even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[105]

Finally, the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government. The Supreme Court has held that merely because the result of imposing the fuel tax will deprive the Tribes of the revenues which they are currently receiving, does not infringe on the right of reservation Indians to "make their own law and be ruled by them."

The Tribe's interests in raising revenues simply cannot outweigh the State's legitimate interest in raising revenues through its system of taxation.[106] The State's interest in imposing such a tax is greatest when the "tax is directed at off-reservation value and when the taxpayer is the recipient of state services".[107] In this case, it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors.[108] Further, it is also

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[104] *Colville*, 447 U.S. at 152, 100 S.Ct. 2069; *Sac and Fox*, 213 F.3d at 583.

[105] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[106] *Id.* at 157, 100 S.Ct. 2069. *See also ANR Pipeline*, 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

[107] *Colville*, 447 U.S. at 157, 100 S.Ct. 2069.

[108] *Sac and Fox*, 213 F.3d at 580.

undisputed that only a small part of the fuel sales are made to persons who either live or work on the reservation who are the recipient of tribal services. The majority of the fuel consumers are recipients of state services. Even if the Court accepts the Tribe's proposition that the fuel sales are a result of value generated on reservation land, the Tribe cannot show that a substantial portion of the taxpayers are recipients of tribal services as opposed to state services. For the above reasons, defendant's motion for summary judgment shall be granted on the Tribe's claim regarding tribal rights to self-government.

E. Kansas Act for Admission

In addition to claims based on preemption and tribal rights to self-government, the Tribe also asserts a claim under the Kansas Act for Admission § 1. The Kansas Act for Admission states that:

> [n]othing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory. . . .

Based on this language, the Tribe argues that the state is prohibited from taking action that impairs the Tribe's right to impose and collect its own tribal taxes, impairs the Tribes right to finance its government through tribal taxation and imposes on the Tribe's right to engage

in sovereign functions of self-government. The Tribe asserts that unlike causes of action based on federal preemption, there is no need to balance the state, federal and tribal interests for claims arising from the Kansas Act for Admission.

The Court finds that even if the Kansas Act for Admission can be read to preserve the Tribe's sovereign right to impose tribal taxes on reservation and to engage in commercial business on its reservation as proposed by the Tribe, the Court's foregoing analysis regarding tribal rights to self-government is still applicable. As mentioned above, while the Tribe has every right to impose tribal fuel taxes, by doing so it does not oust the State from imposing state tax on sales made to non-Indians. Further, even if the state tax imposes on the Tribe's ability to carry-on a commercial business by increasing the cost of the product, a state tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[109] "[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."[110] For these reasons defendant is entitled to judgment as a matter of law and summary judgment is granted on the Tribe's claim asserted under the Kansas Act for Admission.

IV. CONCLUSION

In finding that the Court has jurisdiction over this matter, the Court rejects defendant's claim to immunity based on the Eleventh Amendment and rejects defendant's

[109] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[110] *Id.*

claim that the Tribe lacks standing to bring this suit. Additionally, the Court finds, contrary to defendant's arguments, that the Hayden-Cartwright Act does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations. Finally, because no material issue of fact remains regarding the Tribe's claims arising under federal preemption, tribal right to self-government or Kansas Act for Admission and because defendant is entitled to judgment as a matter of law, defendant's motion for summary judgment is granted.

IT IS THEREFORE BY THE COURT ORDERED that State's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS SO ORDERED.

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen S. RICHARDS, Secretary of the
Kansas Department of Revenue, State of Kansas,
in his official capacity, Defendant.
No. 99-4071-JAR.
July 2, 2003.

Indian tribe moved for reconsideration of decision, 241 F.Supp.2d 1295, which denied its action for relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. The District Court, Robinson, J., held that (1) district court did not rely on allegedly objectionable evidence in making its ruling, and (2) request that court rule that tribe had a constitutional and self-government right to impose tribal taxes with respect to motor fuel sold on reservation, did not warrant reconsideration.

Motion denied.

ROBINSON, J.

This matter is before the Court on Plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) brought pursuant to Fed.R.Civ.P. 59(e). Plaintiff asks this Court to reconsider and alter its order granting defendant's motion for summary judgment (Doc. 73).

I. BACKGROUND

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose

reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales via a tribally imposed tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel.

In addition to the tribal fuel tax, the Kansas Department of Revenue collects motor fuel tax on fuel distributed to the Nation Station pursuant to the Kansas Motor Fuel Tax Act.[2] The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe

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[1] 25 U.S.C. § 2701 *et seq.*

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

claimed that the Indian Commerce Clause,[4] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[5] or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by this Court on January 15, 2003.[6]

In granting defendant's motion for summary judgment, the Court found that neither the doctrine of federal preemption or the doctrine of tribal rights to self-government prevented the state from imposing taxation on the fuel sold at the Nation Station. The Court further found that the Kansas Act for Admission did not prevent the state from imposing its own tax on fuel sold at the Nation Station. Plaintiff now asks the Court to reconsider its judgment. For the reasons discussed below, plaintiff's request is denied.

II. STANDARD OF REVIEW

A court may reconsider and alter a prior judgment if it is necessary to correct manifest errors of law or fact or to accept newly discovered evidence.[7] However, this does not include a review of arguments or evidence that could and should have been presented through the summary judgment

[4] U.S. CONST. art. I, § 8 cl. 3.

[5] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[6] *See Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[7] *Buell v. Security General Life Ins. Co.*, 784 F.Supp. 1533, 1536 (D.Colo.1992), *aff'd* 987 F.2d 1467 (10th Cir.1993).

process.[8] Likewise, it is inappropriate to re-visit issues that have already been addressed.[9] There is no entitlement to a second chance when a party has failed to present its strongest case in the first instance.[10] Three grounds for reconsideration are generally recognized: (1) an intervening change in controlling law, (2) availability of newly discovered evidence, and (3) a need to correct clear error or prevent manifest injustice.[11] Deciding whether to grant or deny a motion to alter or amend a judgment is within the court's discretion.[12]

III. DISCUSSION

Plaintiff's motion to reconsider first asserts that the Court erred in granting defendant's motion for summary judgment because the Court relied on defense exhibits that plaintiff had objected to in "Plaintiff's Objections to Defendant's Witness and Exhibit List" (Doc. 54). While plaintiff's objections to defendant's witness and exhibit list sought to preclude defendant from using objectionable evidence at trial, plaintiff's response to defendant's motion for summary judgment incorporated some of the objections as they related to those exhibits supporting defendant's

[8] *Steele v. Young*, 11 F.3d 1518, 1520 n. 1 (10th Cir.1993); *Wolfgang v. Mid-American Motorsports, Inc.*, 914 F.Supp. 434, 438 (D.Kan.1996); *Buell*, 784 F.Supp. at 1536.

[9] *Comeau v. Rapp*, 810 F.Supp. 1172, 1175 (D.Kan.1992).

[10] *Anspach v. Tomkins Indus., Inc.*, 817 F.Supp. 1499, 1518 (D.Kan.1993), *aff'd* 51 F.3d 285 (10th Cir.1995) (Table).

[11] *See e.g., Eichenwald v. Krigel's, Inc.*, 908 F.Supp. 1531, 1564-65 (D.Kan.1995).

[12] *Bancamerica Comm. Corp. v. Trinity Indus., Inc.*, No. 90-2325-GTV, 1995 WL 646790, at *1 (D.Kan. Oct.19, 1995) (citing *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir.1988)).

motion for summary judgment. On page seven of its response to defendant's motion for summary judgment, plaintiff asserts, "The Nation objects to Defendant's Exhibits 2-6 for all of the reasons stated in Plaintiff's Objections to Defendant's Witness and Exhibit List filed herein on October 30, 2000."

The exhibits that plaintiff objected to contain information regarding the services provided to the reservation such as education, fire and police support. Plaintiff now seeks a Court order sustaining its objections to defendant's witness and exhibit list and in turn, plaintiff asks the Court to reconsider its ruling on defendant's motion for summary judgment. The Court declines plaintiff's proposition to rule on its objections to defendant's witness and exhibit list because contrary to plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion.

Plaintiff contends that the Court relied on objectionable evidence because in Footnote 94 of the Court's order, the Court noted that, "the State also provides services on and near the reservation including maintenance of U.S. Highway 75 . . . fire and police protection." The Court first notes that plaintiff's response to defendant's motion for summary judgment does not dispute that these services exist. Instead, plaintiff simply disputes the extent to which the state services are more "significant, substantial or valuable" when considered in relation to tribal services.[13] Secondly, and more importantly, the Court's statement

[13] Plaintiff's Response to Defendant's Motion for Summary Judgment at 5 (Doc. 59).

regarding state services on and near the reservation was collateral to its actual holding.

In granting defendant's motion for summary judgment, the Court ruled that the state was not preempted from imposing its own fuel tax on fuel sold at the Nation Station. The Court determined that the evidence favoring the state's interest in imposing the motor fuel tax was so one-sided that the defendant was entitled to prevail as a matter of law. The Court's holding was largely premised on the fact that the state fuel tax was imposed on the sale of non-Indian products to non-Indian consumers.[14]

In reaching this conclusion, the Court noted that the legal incidence of the Kansas motor fuel tax undisputably falls on non-Indian distributors.[15] In addition, the Court rejected plaintiff's contention that fuel sold at the Nation Station was an Indian product because the tribe operates a casino in close proximity to the Nation Station. Finally, the Court noted that while the legal incidence of the tax falls on the distributors, the ultimate burden of the tax falls on consumers, the majority of which are non-Indian and are provided governmental services by the state off the reservation. The Court's statement regarding state services on and near the reservation was simply an attempt to reveal that the small number of fuel purchasers who live or work on the reservation receive some state services. Thus, the Court finds this is not an issue that

[14] *Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[15] *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 580 (10th Cir.2000) (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

requires this Court to correct clear error or prevent manifest injustice.

Plaintiff's second request in its motion for reconsideration is that the Court make a ruling finding that the plaintiff has a constitutional and federal self-government right to impose tribal taxes with respect to motor fuel sold on the reservation. It is clear from the Court's order granting summary judgment that such a ruling has already been made. In its order, the Court found that "[t]here is no question that the Tribe's power to tax transactions occurring on trust lands 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . .'"[16] The Court further found that despite plaintiff's right to tax transactions on reservation land, the tribe cannot "oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business."[17] Thus, the Court ruled in accordance with plaintiff's request, and there is nothing to reconsider.

Plaintiff's final request is that the Court reverse its judgment and enter judgment for plaintiff. The Court finds that plaintiff fails to proffer any grounds or argument justifying reconsideration. At best, plaintiff's motion merely rehashes arguments previously considered and rejected by the Court.[18] As such, the Court declines to

[16] *Prairie Band Potawatomi Nation,* 241 F.Supp.2d at 1311 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

[17] *Id.*

[18] *See Resolution Trust Corp. v. Greif,* 906 F.Supp. 1446, 1456-57 (D.Kan.1995) (noting a motion to reconsider is not a mechanism to raise

(Continued on following page)

revisit settled issues. In sum, plaintiff has not presented any instances of manifest error or mistake warranting reconsideration of the Court's prior ruling. Plaintiff's motion shall be denied.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) is denied.

arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court).

United States Court of Appeals
Tenth Circuit.

AUG 11 2004

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION,

Plaintiff-Appellant,

v. No. 03-3218

STEPHEN S. RICHARDS, Secretary of the Kansas Department of Revenue,

Defendant-Appellee,

WINNEBAGO TRIBE OF NEBRASKA, HCI DISTRIBUTION, THE KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS, THE IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE SAC AND FOX NATION OF MISSOURI,

Amici Curiae.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 99-CV-4071-JAR)

David Prager, III, Tribal Attorney, Prairie Band Potawatomi Nation, Mayetta, Kansas, for Plaintiff-Appellant.

John Michael Hale, Special Assistant Attorney General, Kansas Department of Revenue, Topeka, Kansas, for Defendant-Appellee.

Vernle C. Durocher, Jr., Mary J. Streitz, and Christopher R. Duggan of Dorsey & Whitney LLP, Minneapolis, Minnesota; Thomas E. Wright of Wright, Henson, Somers, Sebelius, Clark & Baker, LLP, Topeka, Kansas; and Mark Hubble, Tribal Attorney, Winnebago Tribe of Nebraska, Winnebago, Nebraska, for Winnebago Tribe of Nebraska and HCI Distribution; Ilse L. Smith, P.C., Kansas City, Missouri, for Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Mark S. Gunnison of Payne & Jones, Chartered, Overland Park, Kansas, for Iowa Tribe of Kansas and Nebraska; and Thomas Weathers of Alexander, Berkey, Williams & Weathers LLP, Berkeley, California, for the Sac and Fox Nation of Missouri in Kansas and Nebraska, submitted a brief for amici curiae.

Before LUCERO, McKAY, and HARTZ, Circuit Judges.

McKAY, Circuit Judge.

This case addresses whether federal law prohibits Kansas from collecting its state tax on fuel supplied to an Indian tribe by a non-Indian distributor. Prairie Band Potawatomi Nation (the "Nation") sought to invalidate the fuel tax on grounds that it is preempted by federal law and that it infringes on the Nation's rights of self-government. The district court granted summary judgment for the Secretary of the Kansas Department of Revenue (the "Secretary"), and the Nation brought this appeal.

Facts

The following facts are undisputed. The Nation is a federally-recognized Indian tribe whose reservation is on United States trust land in Jackson County, Kansas. Aplt. App., Vol. I, at 35. On its reservation, the Nation financed, constructed, and now owns and operates a $35 million casino. *Id.*, Vol. II, at 70. By building this casino, the Nation increased the number of people who travel to this otherwise remote and rural area. *Id.* at 70-71. To accommodate casino patrons and other reservation-related traffic, the Nation financed and built a gas station (the "Nation Station") which is close to the casino and on the same federal trust land. In building the Station, the Nation incurred $1.5 million in construction costs, which included the purchase of a motor fuel handling system with tank storage and monitoring systems to make fuel available to customers. *Id.*, Vol. III, at 22. The Nation Station is tribally-owned and operated, and, as of May 2000, eleven of its fifteen employees were Indians, with seven of those being Nation tribal members. *Id.* at 2-3. The Nation submitted expert testimony, which the Secretary does not dispute, that "the 'value marketed' by [the] Nation Station results from the business generated by the casino and from employees of the casino and [the Nation's] government and residents." *Id.*, Vol. II, at 86. This conclusion is supported by the undisputed evidence that seventy-three percent of the Nation Station's fuel customers are casino patrons and casino employees and another eleven percent live or work elsewhere on the reservation. *Id.*; *Id.*, Vol. V, at 46; Aple. Br. at 5. The Nation's expert also reported that the Station is a location-dependent business because, "[b]ut for the casino, there would not be enough traffic to support [it] in its current location." Aplt. App., Vol. II, at 86. The Nation Station sells fuel at fair market

prices. Therefore, it cannot and does not advertise an exemption from state fuel taxes. The Nation's expert concluded that "the Nation is not 'marketing a tax exemption' because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market." *Id.* at 84. The Nation also submitted two affidavits – one from the Station's manager and one from the Nation's Treasurer and Tax Commissioner – that support this conclusion. *Id.* at 71; *Id.*, Vol. III, at 161. The Secretary has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices.

The Nation imposes a tax on the Station's fuel sales: 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). Aplt. App., Vol. IV, at 207; Vol. V, at 169. The Station provides the Nation with its sole source of fuel revenue, which amounts to about $300,000 in tribal fuel taxes each year. Aplt. App., Vol. III, at 3. Pursuant to the Nation's Motor Fuel Tax law, this fuel revenue is used for "constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation." *Id.*, Vol. IV, at 208. This includes maintenance on the road that connects the United States Highway 75 to the Nation's casino. The Nation receives no financial assistance from Kansas to maintain this stretch of roadway.

Discussion

In this dispute, the Nation challenges the 1995 amendment to the Kansas Motor Fuel Tax Act. Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997). Pursuant to this

amendment, the Kansas Department of Revenue began collecting, for the first time, a tax on motor fuel distributed to Indian lands. The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors. Kan. Stat. Ann. § 79-3408(c); *Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000). But, the distributors are allowed to pass the tax directly to retailers, like the Nation Station. Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as part of the selling price.") The Nation brought suit to enjoin the Secretary from imposing the tax on the Nation's fuel, and the district court granted summary judgment for the Secretary. We review a district court's grant of summary judgment *de novo* to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1175 (10th Cir. 2001); *Sac and Fox,* 213 F.3d at 583.

The Nation asks us to invalidate the tax as it applies to the Nation's fuel under two independent but related doctrines. First, the Nation argues that federal law preempts the tax because federal and tribal interests against state taxation outweigh Kansas' interests in imposing the tax. Second, the Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government. Either of these doctrines would be sufficient to invalidate the Kansas fuel tax as applied here. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

We first address whether the tax is preempted by federal law. The constitutional source of federal preemption is Article I, Section 8, Clause 3, which provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." When preemption analysis is applied to Indian cases, we consider the unique origins of tribal sovereignty and how it differs from state sovereignty. *Bracker,* 448 U.S. at 143. Specifically, "[a]mbiguities in federal law have been construed generously in order to comport with [the] traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143-44 (citing *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174-75, and n.13 (1973)). "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertions of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).

In cases like this – where a tribe is challenging a state tax – "[t]he initial and frequently dispositive question . . . is who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy. . . ." *Id.*

Although the Secretary argues that the balancing of interests test should be abandoned, citing Justice (now Chief Justice) Rehnquist's partial dissent in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 176-80 (1980), circuit precedent requires us to use this balancing test. *See Sac and Fox,* 213 F.3d at 583. The balancing test is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker,* 448 U.S. at 145.

Applying these principles, we conclude that the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax. The Nation's interests are particularly strong. Tribes have a recognized "interest in raising revenues for essential governmental programs, [and] that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville,* 447 U.S. at 156-57.

Here, the Nation's fuel revenues are derived from value generated primarily on its reservation. In determining reservation value, the unique facts of this case require us to look beyond the physical fuel (the Nation receives its fuel in "ready to sell" condition) and to view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219-20 (1987) (balancing tribal and state interests by examining the bingo enterprise as including the facilities and ancillary

services offered to patrons); *Bracker,* 448 U.S. at 145-51 (weighing the tribe's general economic interest in its timber industry to invalidate a state motor carrier license tax and a use fuel tax applied to non-Indians doing business with the tribe); *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n,* 829 F.2d 967, 986 (10th Cir. 1987) (weighing the tribe's interest in its bingo enterprise as a "form of entertainment"); *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1410 (9th Cir. 1992) (weighing the state interests in taxing tickets to on-reservation events and concessionary items against the tribes' "involvement in the production of the entertainment events which take place on its reservation").

The close nexus between the Nation's fuel sales and its gaming enterprise is critical to our analysis here. When we recently reviewed the Kansas fuel tax as it applied to a tribe's retail station alone, we held that "the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value 'generated on the reservations by activities in which the Tribes have a significant interest.'" *Sac and Fox,* 213 F.3d at 585 (quoting *Colville,* 447 U.S. at 155) (remanding to develop an adequate record to balance tribal and state interests). There, we also held that we would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians, particularly where the tribes' "fuel market exists only because of the Tribes' claimed exemption from the [state] fuel tax." *Id.* Here, in contrast, the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides. Also, unlike in *Sac and Fox,* the Nation's fuel market does not exist because of a

claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities. This is clear from both the undisputed expert testimony that the Station's fuel market only exists because of the Nation's casino and from the undisputed fact that seventy-three percent of the Station's fuel patrons are casino patrons and employees. For these reasons, we balance the competing interests by viewing the Nation's fuel revenues as being derived primarily from value generated on its reservation.

In balancing the interests, both the district court and the Secretary heavily relied on *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), to conclude that Kansas' interests in taxation outweigh the competing federal and tribal interests. Aplt. App., Vol. V, at 64-65; Aple. Br. at 30-31. In *Colville,* the Court upheld state taxes applied to on-reservation retail sales of cigarettes and tobacco products because "[w]hat the smokeshops offer . . . is solely an exemption from state taxation." *Id.* at 155. "It is painfully apparent," the Court said, "that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* The Court then validated the state tax, holding that "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

We distinguish *Colville* in two critical ways. First, in stark contrast to the smokeshops in *Colville,* the Nation is not marketing an exemption from state taxes. The undisputed

evidence is that the Nation sells its fuel at fair market prices. Aplt. App., Vol. II, at 71, 84; Vol. III, at 161. Thus, a central component to the reasoning of *Colville* is inapplicable here.

Second, unlike in *Colville,* the Nation is not merely importing a product for resale to non-Indians; rather, the revenues from the Nation's fuel to non-Indian consumers are derived from value "generated on the reservation [] by activities in which [the Nation has] a significant interest." *Colville,* 447 U.S. at 155. It is undisputed that when the Nation financed and built its $35 million casino to attract non-Indian patrons, it created a new fuel market for an otherwise remote area. After creating this new market, the Nation financed and built the Station to offer fuel to its casino patrons and other reservation-related traffic.

The Supreme Court has acknowledged this second distinction when it distinguished *Colville* where tribes "are not merely importing a product onto the reservations for immediate resale to non-Indians" but have created an entertainment enterprise designed to attract non-Indian consumers onto its reservation. *Cabazon,* 480 U.S. at 219. In *Cabazon,* the Supreme Court held that the federal and tribal interests outweighed state interests in regulating bingo and other games because, unlike in *Colville,* the tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. *Id.* As in *Cabazon,* the Nation built a modern casino and ancillary services, like

the Nation Station, in order to offer its patrons an attractive entertainment opportunity. Here, seventy-three percent of the Nation Station's fuel customers are casino patrons and employees. Aplt. App., Vol. II, at 86. These patrons, like those in *Cabazon,* spend extended amounts of time using the entertainment services offered by the Nation. Thus, the Nation's fuel revenues are derived from activities – that is, drawing non-Indians to its gaming enterprise – in which the Nation has a significant interest.

The Nation's interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance. It is undisputed that the Nation's only source of fuel revenue comes from the Nation Station. *Id.,* Vol. III, at 3. Fuel revenue is typically used to pay for a government's infrastructure expenses, and, in this case, the Nation's Motor Fuel Tax law specifically requires that all fuel revenue (approximately $300,000 per year) be used for "constructing and maintaining roads, bridges and rights-of-way located on or near the reservation." *Id.,* Vol. IV, at 208. The Nation has the financial responsibility for the majority of the roads and bridges on and near its reservation. *Id.,* Vol. III, at 22-23. Of particular importance here, the Nation has an ongoing and future responsibility to maintain the stretch of roadway that connects the United States 75 Highway (the main highway leading to the reservation) with the casino. *Id.* at 23. "The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1 1/2 miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection." *Id.* Thus, the Nation used its fuel revenues to provide better access from the main federal highway to its

casino. Kansas does not contribute funds to cover the costs of maintaining this access road.

The Secretary argues that the Nation could continue collecting fuel revenues from the Nation Station by imposing its tax in addition to the state tax. But the Nation's expert explained that this is not economically feasible. He reported that [b]asic economic theory teaches that the [Nation Station] cannot charge prices high enough to allow collection of both the Kansas and [the Nation's] fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero. Aplt. App., Vol. II, at 89. The Secretary has not submitted contradictory evidence and has not argued that this opinion is either incorrect or exaggerated. The "economic realities of the situation [] both in the presence and absence of the motor fuel tax" are relevant in balancing the competing interests. *Sac and Fox,* 213 F.3d at 585; *see also Colville,* 447 U.S. at 157-58 (noting that a tribe bears the burden of showing that its smokeshop businesses would be significantly reduced absent a credit for tribal taxes paid). This economic reality adds to the Nation's already strong interests against taxation.

The Nation's interests in this case are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments. These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001); Indian Self-Determination

and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed. Reg. 57641 (Nov. 15, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Presidential Executive Order 13175, 65 Fed. Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ("[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."); *Bracker,* 448 U.S. at 143-44 (noting "a firm federal policy of promoting tribal self-sufficiency and economic development" as evidenced by various congressional enactments); *Colville,* 447 U.S. at 155 (recognizing "varying degrees [of] congressional concern with fostering tribal self-government and economic development").

Against these strong tribal and federal interests, the sole interest Kansas asserts is its general interest in raising revenues. Of course, states have a "legitimate governmental interest in raising revenues, and that interest is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville,* 447 U.S. at 157. Here, Kansas' interest is not at its strongest. The tax is directed at fuel which, under the particular circumstances of this case, is derived primarily from value generated on the reservation. Also, Kansas does not provide any financial assistance in maintaining the access roadway from the United States 75 Highway to the casino. The ongoing and future obligation to upkeep this stretch of roadway is exclusively the Nation's, and the Nation's only source of fuel revenue (which is designated for this obligation) comes from the Station.

Under these facts, Kansas' generalized interest in raising revenues is insufficient to justify its tax.

Therefore, we invalidate the Kansas Motor Fuel Tax as it applies to the Nation's fuel because the balance of tribal, federal, and state interests prohibits state taxation as a matter of law. Although Kansas has a legitimate interest in raising revenue, this general interest is insufficient to justify the tax under these particular facts because it interferes with and is incompatible with strong tribal and federal interests against taxation.

REVERSED.

No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

STEPHEN RICHARDS, in his official capacity as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1) When a State taxes the receipt of fuel by distributors, manufacturers and importers, and such receipt occurs off-reservation, does the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), apply because the fuel is later sold by a tribe to final consumers?

2) Should the Court replace the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent?

3) Did the court of appeals err in applying the *White Mountain Apache* interest balancing test by, *inter alia*, placing dispositive weight on the fact that a tribally-owned gas station derives income from largely non-tribal patrons of Respondent's nearby casino?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Material Facts	3
B. Proceedings Below	4
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. The Court of Appeals' Decision Directly Conflicts With Controlling Precedent From This Court With Respect to Applicability of the *White Mountain Apache* Balancing Test	9
A. State Interests	10
B. Tribal Interests	13
C. Balancing Off-Reservation State Authority Is Improper	14
II. Because *White Mountain Apache* Interest Balancing Fails to Promote Evenhanded, Predictable and Consistent Development of Legal Principles, It Should Be Replaced with a Preemption Analysis Based on Congressional Intent	21

TABLE OF CONTENTS – Continued

	Page
III. Contrary to Controlling Precedent From This Court, the Court of Appeals' Decision Wrongly Placed Respondent's Economic Interest in a Position Superior to the State's Strong, Fundamental Interest in Its System of Off-Reservation Taxation	33
CONCLUSION	40

TABLE OF AUTHORITIES

Page

CASES

Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) 23

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) 14, 16

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 15

Chemehuevi Indian Tribe v. California State Bd., 800 F. 2d 1446 (9th Cir. 1986) 35

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 13

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) 9, 19, 37, 38, 39

County of Yakima v. Confederated Tribes and Bands of Yakama Nation, 502 U.S. 251 (1992) 33

DeCoteau v. District County Court, 420 U.S. 425 (1975) 16

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 38

Dows v. Chicago, 78 U.S. (11 Wall) 108 (1870) 12

Fisher v. District Court, 424 U.S. 382 (1976) 13

Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996) 38

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 12

Jones v. Meehan, 175 U.S. 1 (1899) 13

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 14

TABLE OF AUTHORITIES – Continued

Page

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..... *passim*

Montana v. Crow Tribe, 523 U.S. 696 (1998) 37

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 34

Nat'l Private Truck Council, Inc. v. Oklahoma Tax Com'n., 515 U.S. 582 (1995) 12

N.W. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989) 17

Nevada v. Hicks, 533 U.S. 353 (2001) 14, 19, 20

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 6, 15

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) ..... *passim*

Payne v. Tennessee, 501 U.S. 808 (1991) 23

Prairie Band Potawatomi v. Richards, 379 F.3d 979 (10th Cir. 2004) 28

Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005) 17, 28

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 23, 24

Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 15, 32

Roff v. Burney, 168 U.S. 218 (1897) 13

Rosewell v. LaSalle Nat. Bank, 450 U.S. 503 (1981) 11

Sac and Fox v. Pierce, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) 31, 38

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 22

TABLE OF AUTHORITIES – Continued

Page

Smith v. Allwright, 321 U.S. 649 (1944) 22

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 14

Thomas v. Gay, 169 U.S. 264 (1898) 33, 34

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 11

United States v. Detroit, 355 U.S. 466 (1958) 23

United States ex rel. Mackey v. Coxe, 59 U.S. (18 How) 100 (1856) 13

United States v. New Mexico, 455 U.S. 720 (1983) 22, 32

United States v. Quiver, 241 U.S. 602 (1916) 13

United States v. Wheeler, 435 U.S. 313 (1978) 16

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) ..... *passim*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

Williams v. Lee, 358 U.S. 217 (1959) 13

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) 24, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, cl. 3 1

STATUTES

25 U.S.C. § 2701 26

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1341 11

TABLE OF AUTHORITIES – Continued

Page

Kan. Stat. Ann. § 79-3402 (1997) 2, 6, 38

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) 2

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) 2, 6, 13

Kan. Stat. Ann. § 79-34,141 (b)(1)(2) (Supp. 2003) 3

OTHER

The Federalist, No. 32 (Alexander Hamilton) 10

The Federalist, No. 45 (Alexander Hamilton) 10

Pub. L. No. 332, 50 Stat. 738, ch. 726, § 1 (1937) 11

S. Rep. 1035, 75th Cong. (1937) 18

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-334 18

OPINIONS BELOW

The August 11, 2004, decision of the United States Court of Appeals for the Tenth Circuit is reported at 379 F.3d 979 (10th Cir. 2004), and is included in the Joint Appendix. The prior decisions of the District Court are reported at 241 F. Supp. 2d 1295 (D. Kan. 2003), and 2003 WL 21536881 (D. Kan. 2003). These decisions are included in the Joint Appendix (hereinafter "J. A.").

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The court of appeals issued its decision in this case on August 11, 2004. The Petitioner petitioned for a writ of *certiorari* on November 5, 2004, which was granted on February 28, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Indian Commerce Clause of Article I provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. U.S. Const. Art. I, § 8, cl. 3.

STATUTORY PROVISIONS INVOLVED

Kan. Stat. Ann. § 79-3402 (1997) provides that

> The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever.

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) provides that

> A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) provides that

> Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein . . . .

Kan. Stat. Ann. § 79-34,141(b)(1) and (2) (Supp. 2003) provides that

> On and after July 1, 2003, until July 1, 2020, the tax imposed under this act shall be not less than: (1) on motor-vehicle fuels, $.24 per gallon, or fraction thereof; (2) on special fuels, $.26 per gallon, or fraction thereof[.]

STATEMENT OF THE CASE

A. Material Facts.

Kansas imposes a tax of 24 cents per gallon on gasoline and 26 cents per gallon on diesel fuel Kan. Stat. Ann. § 79-34,141(b)(1)(2) (Supp. 2003). The tax is imposed on the receipt of motor fuel by a distributor, importer or manufacturer. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). Gasoline and diesel fuel, in a finished, ready to sell condition, are imported from outside Respondent's reservation for re-sale at its gas station. J. A. 91, 114. Davies Oil (distributor here), located in Troy, Kansas (off-reservation, approximately 60 miles from Respondent's gas station), receives gasoline and diesel off-reservation and resells it to Respondent. J. A. 5, 19, 91, 112, 119. The State provides services to the taxpayer (the fuel distributor), Respondent and Respondent's customers, including but not limited to a state-wide road, bridge and highway infrastructure, chief among which is a four-lane highway crossing Respondent's reservation and leading to its casino and gasoline station from population centers in Kansas. J. A. 114-15, 118.

Respondent sells gasoline at its station largely to non-Indians, many of whom may have patronized its casino. J. A. 88, 91. Most of the non-Indian purchasers of the

gasoline drive largely off-reservation. J. A. 114-15, 118. Respondent imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. J. A. 91. Respondent uses the revenue from its tax to maintain some of the roads on its reservation, including the one-and-one-half miles of road from the state maintained highway at its reservation boundary to its casino. J. A. 42, 79, 91-2.

B. Proceedings Below.

Respondent filed suit in federal district court seeking to enjoin the State from imposing its motor fuel tax on fuel received off-reservation by Respondent's fuel suppliers. J. A. 90. The district court granted the Petitioner's Motion for Summary Judgment and denied Respondent's request for reconsideration. J. A. 90, 123. In making these rulings, the district court held that the State has a fundamental, sovereign interest in its system of taxation. J. A. 119. The district court determined that the legal incidence of the State tax at issue falls on the distributor, and not the Respondent. J. A. 119. The district court held that because the State exercised its tax jurisdiction off-reservation, the State's interests were at their strongest and exceeded the economic interests of Respondent, which were, comparatively, at their weakest. J. A. 114-15. Finally, the district court rejected Respondent's argument that selling finished gasoline near the Respondent's casino generated value on the reservation sufficient to supersede the State's sovereign interest in its system of off-reservation taxation. J. A. 114.

The court of appeals, reviewing the district court's decision *de novo*, reversed the district court. J. A. 131. The court of appeals concluded that precedent of the circuit precluded it from addressing the State's request to abandon

the balance-of-interests test. J. A. 137, and concluded that the balance-of-interests test is appropriate to analyze, and ultimately strike, the State tax imposed off-reservation. J. A. 137. The court of appeals acknowledged that the State's tax was imposed off-reservation against a non-tribal member but nevertheless concluded that the Kansas tax, as applied, is preempted by implication as incompatible with and outweighed by the strong tribal and federal interests against the tax. The tribal and federal interests noted by the court were the generalized interest in economic viability of Respondent. J. A. 142-43.

The court of appeals relied principally upon the fact that approximately three-quarters of Respondent's gas station customers were either casino patrons or employees, and that the station's revenues therefore were derived from "value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." J. A. 143 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)). The court of appeals distinguished this Court's decision in *Colville* because Respondent maintains a one-and-a-half mile access road from State Highway 75 to Respondent's gas station, J. A. 143, and because Respondent was then selling its gasoline within two cents of the prevailing local market rate. J. A. 139-40.

SUMMARY OF ARGUMENT

I. In the long, sometimes tumultuous history of federal, state and tribal relations, few absolutes have been established. One absolute that has emerged, however, is that when a state administers and enforces its non-discriminatory laws off-reservation, and Congress has not

expressly preempted those non-discriminatory state laws, state sovereignty supersedes tribal interests.

This Court has only applied the *White Mountain Apache* balance-of-interests test in state-tribal matters when a State endeavors to exert its authority on-reservation. There is no precedent from this Court that imposes the balance-of-interests test against a non-discriminatory state law imposed and administered off-reservation. Indeed, precedent from this Court has clearly held that States are free to apply their non-discriminatory laws off-reservation, even against Indians. In so holding, this Court has held that a tribe's or its members' general exemption from state regulation ends at the reservation border. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). ("[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component'"). Hence, decisions from this Court holding that States are free to apply their non-discriminatory laws off-reservation rely on traditional preemption standards (express congressional preemption, or where Congress has so occupied a given field that there is no room for state jurisdiction), and do not utilize a balancing analysis. "Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

Kansas' system of fuel taxation is designed to pay for building and maintaining its roads, highways and bridges. Kan. Stat. Ann. § 79-3402 (1997). The Kansas legislature has imposed the legal incidence of its fuel tax on the first receipt of fuel by distributors, manufacturers or importers. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). Under the facts of this case, the state fuel tax attached when the fuel was

first received by the distributor, which is off-reservation in Troy, Kansas. J. A. 5, 19, 91, 112, 119.

The court of appeals' decision below has improperly created a "halo effect" of tribal immunity beyond reservation borders to strike the State's interest in its off-reservation system of taxation. The court of appeals held that the State's application of non-discriminatory off-reservation laws was subject to balancing because the state law might subsequently touch upon on-reservation tribal activity. In practical effect, the court extended "Indian country" beyond Respondent's reservation borders into all four corners of the State of Kansas by rationalizing that otherwise lawful off-reservation state regulation might subsequently result in an economic cost to the Respondent. It is further disconcerting that there are no practical, limiting parameters in the court of appeals' rationale or holding.

Logically extended, the court of appeals' analysis means that a tribe's interests reach beyond not only its reservation boundaries, but beyond the boundaries of Kansas into other states, and can be used to strike any state tax anywhere, provided the tribe can show that the state tax may appear as a cost for products or services that subsequently end up on the tribe's reservation. Equally disturbing, the court of appeals has imbued a private corporation, the distributor receiving the fuel off-reservation, with Respondent's general, on-reservation immunity from state regulation – a wholly unprecedented and anomalous result.

II. The balance-of-interests test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), has proved unworkable. Tax administration requires

predictability. The balance-of-interests test provides none. Here, Kansas administers its system of fuel taxation in full compliance with *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), only to have the court of appeals strike it down. Even though the state tax was imposed off-reservation (upstream, away from Respondent – in compliance with *Chickasaw Nation*), the state system of taxation was still preempted by the court of appeals because the economic effect of the cost of the state tax could be passed through to Respondent.

While this Court adheres to *stare decisis* as an ordinary matter, it has not hesitated to abandon precedent that has shown itself ill-fitted to coherent, reasonably predictable decision-making. Kansas believes that such a time has arrived in regard to the balance-of-interests test. As predicted by then-Justice Rehnquist, when dissenting in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 176-186 (1980), the test is inimical to predictable tax administration. The balance-of-interests test should be replaced with a standard analogous to that applicable to federal contractors – *i.e.* States may tax non-tribal members, even if the tax may have an economic effect on a tribe, unless Congress has expressly provided otherwise.

III. The court of appeals' decision stretches the concept of "reservation added value" discussed in *Colville* far beyond its intended scope. In determining that the "value" generated by Respondent was sufficient to oust the off-reservation state tax, the court relied almost exclusively on the fact that the tribe built its gas station near its casino and constructed a one-and-a-half mile access road from the gas station to State Highway 75. The court

of appeals determined that the lone state interest was mere revenue raising.

The court of appeals erred by failing to consider that Kansas has built and maintains a major, four-lane highway that cuts through Respondent's reservation. J. A. 36, 39, 67, 79, 114-15, 118. Other state governmental units have built and maintain numerous other miles of roads and bridges both on and near the reservation. J. A. 79. Additionally, Kansas provides substantial services to the taxpayer (here, the distributor) which must use state roads to transport fuel to Respondent's gas station. J. A. 5, 19, 91, 112, 119. Under these circumstances, this Court's decision in *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989), controls. Aside from providing these services, which are no less critical to the casino than a short connector road, the State has not infringed on tribal sovereignty by direct on-reservation regulation or taxation. In the face of this compelling showing of state interests and the absence of any intrusion by Kansas into internal reservation affairs through the challenged tax, the court of appeals plainly lost its way in concluding that, even if applicable, *White Mountain Apache* required that the Kansas motor fuel tax be invalidated.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH CONTROLLING PRECEDENT FROM THIS COURT WITH RESPECT TO APPLICABILITY OF THE *WHITE MOUNTAIN APACHE* BALANCING TEST.

Under the correct legal standard, the Kansas motor fuel tax is not preempted or otherwise invalid, because it

is imposed on the off-reservation receipt of motor fuel by the distributor. The court of appeals erred when it decided this case using the *White Mountain Apache* balance-of-interests test to invalidate the State's motor fuel tax. State taxes imposed and administered off-reservation are subject to review under an altogether different standard (express federal preemption) than state taxes imposed and administered on-reservation (special Indian law preemption based on balance-of-interests). By striking a state system of taxation imposed and administered off-reservation, the court of appeals erred in failing to recognize and uphold the significant and fundamental state sovereignty interests that lie at the heart of our system of federalism.

A. State Interests

The beginning point for analysis in this case is recognition that a State has the sovereign authority to enact and administer non-discriminatory systems of taxation within its jurisdiction. A State's system of taxation is a significant and compelling sovereign interest in our system of federalism. This inherent right was recognized as part and parcel of the accommodation of national and state interests embodied in the Constitution. *The Federalist No. 32* (Alexander Hamilton) ("I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution"); *see also id. No. 45* (Alexander Hamilton) (state authority "extend[s] to all the objects which, in

the ordinary course of affairs, concern the lives, liberties, and properties of people, and the internal order, improvement, and prosperity of the State").

A State's sovereign power to tax its citizens has been a hallmark of western legal tradition. This historical fact was clearly in the Framers' minds when they considered the intertwining doctrines of sovereign immunity and a state power to tax its citizens. State sovereignty to tax as expressed by Alexander Hamilton over two centuries ago has, with limited and express exceptions, withstood challenge. Congress has heeded the Framers' intention by leaving no doubt that a state has a special and fundamental interest in its tax collection system. *E.g.*, Act of Aug. 21, 1937 (Tax Injunction Act), Pub. L. No. 332, 50 Stat. 738, ch. 726, § 1, (1937) (codified at 28 U.S.C. § 1341). *See also* S. Rep. 1035, 75th Cong., at 2 (1937) (noting that the Tax Injunction Act was intended to protect States from well-financed litigants who could "seriously disrupt State and county finances" by withholding tax payments during the course of federal-court litigation). This Court, too, has long recognized that the fundamental attribute of state sovereignty is the authority to administer and enforce state taxes. As it explained in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), the Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 450 U.S. at 522.

This Court has also held that federalism acknowledges "the imperative need of a State to administer its own fiscal operations," (*Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)), and has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state

tax administration," (*Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995)). *See also Colville*, 447 U.S. 134, 157 (1980) ("[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services"); *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) ("[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible").

It is no longer open to debate that a State's authority to administer and enforce its tax laws implicates significant sovereign interests. Without the ability to collect taxes to fund state services for "internal order, improvement, and prosperity of the State," any notion of sovereignty is an illusion. Indeed, while it may be possible to imagine a state government continuing to maintain its sovereignty despite the lack of owning any land, *cf. Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997), it is impossible to imagine that a state government could continue to exist without the power to tax.

Finally, a State's construction and maintenance of its system of roads and bridges can hardly be characterized as anything but providing for "internal order, improvement and prosperity of the State." An extensive, well-maintained road and bridge system is vital to the State's economy. The State's children use the state road and bridge system to get to and from school to receive their education. Law enforcement and emergency fire and rescue personnel use the state road and bridge system to

provide law enforcement and safety services to all of the State's citizens, including tribal members. These are but two examples of the significant interests the State has in its highway infrastructure. It cannot be doubted that a robust road and bridge system, built, maintained and paid for by the State, touches upon and provides benefits for all of the State's citizenry. Kansas funds its road, highway and bridge construction and maintenance principally from its fuel taxes imposed on the receipt of fuel by the distributor, importer and manufacturer. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). In this case, the taxable event – receipt of the fuel by the distributor – occurred off-reservation. J. A. 114, 119.

B. Tribal Interests

This Court has recognized that Indian tribes enjoy the right to "make their own laws and be ruled by them" and that such right is protected by federal law from improper state infringement. *Williams v. Lee*, 358 U.S. 217, 220 (1959). So, for example, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906); the power to make substantive law in internal matters, *Roff v. Burney*, 168 U.S. 218, 222-23 (1897); the power to adjudicate child custody disputes among tribal members, *Fisher v. District Court*, 424 U.S. 382, 389 (1976); the power to prescribe rules for the inheritance of property, *United States v. Quiver*, 241 U.S. 602, 604 (1916); *Jones v. Meehan*, 175 U.S. 1, 29 (1899); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 102 (1856); and the power to regulate economic activity on its own lands,

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).[1]

The Court nonetheless has also recognized that "there is a significant territorial component to tribal power" and that it has no extraterritorial reach. *Id.* at 142. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001) (finding *Merrion* inapposite where tribe attempted to tax transactions by nonmembers that took place on non-tribal fee land within reservation). Equally important, a tribe's self-governance power does not extend as a usual matter to nonmembers and hence cannot affect the latter's obligation to comply with state law. *Cf. Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (tribe lacked adjudicatory authority over personal injury claim arising from on-reservation accident occurring on state highway between two nonmembers).

C. Balancing Off-Reservation State Authority Is Improper

Given the narrow scope of tribal self-governance principles generally and, in particular, with regard to non-tribal members, this Court articulated in *White Mountain Apache* an interest balancing test, which is grounded in *positive* federal-law preemption, to assess the permissible reach of state law with respect to on-reservation activities of non-members engaged in an economic relationship with a tribe. 448 U.S. at 144 ("When on-reservation conduct

[1] The Court has, however, also made clear that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. . . . More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . ") (citation omitted).

Subsequent decisions applying *White Mountain Apache* have employed the special Indian preemption standards only to resolve issues of on-reservation application of state law. *E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 203 (1987) (tribal bingo operations on-reservation, balance favors tribe); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1984) (application of state law to on-reservation hunting and fishing by non-Indians); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 836 (1982) (construction of an on-reservation tribal school, balance favors tribe). Even in the course of such application, this Court has noted the geographical limit on the interest balancing test. *Mescalero Apache*, 462 U.S. at 335 n.18. Here, of course, Respondent has never alleged, and no court has found, that Kansas has attempted in any manner to exercise jurisdiction over any on-reservation tribal activity. Since *White Mountain Apache*, the central theme in this Court's decisions regarding balancing is manifest: balancing is only proper when conflicts between tribal and state interests occur concerning on-reservation activity.

It is unsurprising, therefore, that this Court has formulated a far different rule where off-reservation activity may affect tribes or their members. When the question has involved a State's exercise of off-reservation jurisdiction, there has been one constant in this Court's

precedent: traditional preemption standards – not special Indian law preemption standards – apply. Simply put, there cannot be any conflict off-reservation between State and tribal interests to be balanced, because this Court has determined that a tribe's reservation border acts as a barrier to the reach of a tribe's interests.

In such situations, a "categorical" rule consonant with the ordinary presence of state power in the absence of congressional interdiction governs. As the Court explained seven years prior to *White Mountain Apache*, "tribal activities conducted outside the reservation present different considerations" and that, in such instances, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries generally have been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). *See also DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (tribal jurisdiction limited to Indians and Indian land, and State retains jurisdiction over non-Indians and land which is not Indian Country). The inherent sovereignty of Indian tribes, however, extends only "over . . . their members and their territory" because their dependent status generally precludes extension of tribal civil authority beyond these limits. *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Chickasaw Nation*, 515 U.S. 450, 464 (1995) (tribe's argument that "Indians and Indian tribes are generally immune from state taxation" held not persuasive because "this principle does not apply outside Indian country.").

The modern decisions embodied in cases such as *Mescalero Apache, Chickasaw Nation* and *Atkinson* reinforce the rule that an Indian tribe's dependent status generally precludes extension of tribal interests beyond its

reservation borders. This rule effectively equates with traditional preemption standards – and not the special Indian law preemption standard. *E.g.*, *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). The reservation border thus serves as the line of demarcation in determining which standard to apply.

Given *White Mountain Apache*'s express recognition that, absent express federal preemption, a state is free to apply its non-discriminatory, off-reservation laws (even against Indians), States have relied on the proposition that they are free to apply their non-discriminatory, off-reservation laws without reference to *ad hoc* balancing tests. The court of appeals' decision, in short, significantly and wrongly alters the legal landscape created by *White Mountain Apache* and *Mescalero*. Under the decision below, not only is a State's ability to regulate tribes and their members off-reservation through non-discriminatory laws (including tax statutes) in doubt, but now a State also cannot reasonably even be assured of regulating non-tribal members, even off-reservation, if the regulation might, in some manner, subsequently affect a tribe's on-reservation interests.[2]

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[2] The recent decision in *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005), reflects this skewed view of *White Mountain Apache*'s applicability. The issue there was whether Kansas may administer its motor vehicle licensing and titling laws to vehicles that have been titled on-reservation by the tribe when those vehicles are driven off-reservation. In finding state law preempted, the panel majority applied the *White Mountain Apache* balancing test because "even though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons, 'we deem it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'" *Id.* at 1022. The court thus effectively gave extraterritorial effect to the

(Continued on following page)

Although the patent conflict between the court of appeals' decision and *Mescalero Apache* constitutes ample basis for reversal, other decisions of this Court support, if not dictate, the same result. First, in *Chickasaw Nation*, 515 U.S. 450 (1995), the Court applied the "well-established principle of interstate and international taxation – namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction" – in sustaining the validity of Oklahoma's income tax with respect to earnings from tribal employment within Indian country of tribal members who resided outside Indian country. *Id.* at 462-63. The tribe's response to that "well-established principle" was a provision in the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-34 (applicable to the Chickasaw Nation January 17, 1837, Art. I, 11 Stat. 573), under which no Territory or State was to "have a right to pass laws for the government of the Nation of Red People and their descendants." 515 U.S. at 465. The Court rejected the tribe's argument, finding the treaty privilege restricted to Indian country and not fairly susceptible to being read "as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits." *Id.* at 466. Here, in contrast, Respondent neither does nor can point to some "express" provision of federal law that precludes Kansas from imposing its motor fuel tax on the off-reservation receipt of

tribal regulation because of the perceived adverse impact on that regulation by state non-recognition. *See id.* at 1024 ("[i]f Defendants continue to enforce State motor vehicle registration and titling laws to the exclusion of tribal motor vehicle registration and titling, the Tribe's 'motor vehicle code will be effectively defunct' ").

fuel by a nonmember or, for that matter, a member. The absence of such a claim is dispositive in light of Chickasaw Nation.[3]

That off-reservation regulation may have a direct or indirect on-reservation economic effect – which is at the heart of the rationale offered by the court of appeals for its ruling – makes no difference. In *Chickasaw Nation*, for example, one may assume that requiring a tribal employee to pay state income tax may have affected the compensation level necessary for the tribe to attract and maintain its work force. Perhaps more telling on this point is *Nevada v. Hicks*, 533 U.S. 353 (2001). There, the Court found constitutionally unembarrassed the on-reservation execution of a state court-issued search warrant against a tribal member in connection with an off-reservation violation of state game law. It observed, citing *Mescalero Apache* as authority, that "[i]t is . . . well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation." *Id.* at 362. The Court then held that such "authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes" (*id.* at 363) because "tribal authority to regulate state officers in executing process related to

[3] The *Chickasaw* Court did not address the question whether the Oklahoma income tax infringed impermissibly on tribal self-governance rights. 515 U.S. at 464-65. That issue similarly is not presented here, both because it has never been raised and because internal self-governance is not implicated by virtue of off-reservation state taxation of a nonmember. *See, e.g, Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989) (upholding state oil and gas severance tax imposed upon corporation with respect to reservation production also subject to tribal taxation).

the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them[]'" (*id.* at 364).

Hicks, of course, presented a significantly different factual situation, since no on-reservation regulation by Kansas is at play instantly. It nevertheless negates any suggestion that the *Mescalero Apache* standard is altered by virtue of subsequent, collateral on-reservation effects. As in *Hicks*, any *on-reservation* state conduct attendant to those effects conceivably may raise a preemption issue controlled by special Indian law principles, but the existence of state regulatory authority over the predicate off-reservation conduct remains intact.

Last, the pernicious effect of the court of appeals' reasoning on the States' administration of their tax laws must be emphasized. If the decision below is not reversed, before exercising tax jurisdiction with respect to an off-reservation transaction, States must now try to ascertain whether exercise of that authority might have an indirect economic effect on a tribe's proprietary interests. Such an approach has been expressly eschewed by this Court. *Chickasaw Nation*, 515 U.S. at 460 ("[i]f we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product."). Equally telling is the fact that the court of appeals' reasoning will create an incentive for tribes to assert all manner of claims alleging that off-reservation state taxation, or other civil regulation, has an adverse on-reservation impact which requires preemption analysis under what has proved to date to be the highly subjective interest-balancing standard.

Given the repeated decisions from this Court that tribal interests cannot extend beyond reservation boundaries, coupled with the equally numerous decisions from this Court holding that states are free to apply their non-discriminatory laws off-reservation, even against Indians, the court of appeals' decision here is simply indefensible. Off-reservation regulation by a State is subject instead only to ordinary federal preemption standards, *i.e.* state sovereign power may be preempted only by an express act of Congress exercising a valid constitutional authority or when Congress has so occupied a given field in the exercise of its valid constitutional powers that there is no room for State jurisdiction.

II. BECAUSE *WHITE MOUNTAIN APACHE* INTEREST BALANCING FAILS TO PROMOTE EVENHANDED, PREDICTABLE AND CONSISTENT DEVELOPMENT OF LEGAL PRINCIPLES, IT SHOULD BE REPLACED WITH A PREEMPTION ANALYSIS BASED ON CONGRESSIONAL INTENT.

In order to finance their governments, provide services and properly administer programs for their citizens, States need clarity as to jurisdictional limitations, certainty concerning rules of application, and consistency of results. Unfortunately, the *White Mountain Apache* balance-of-interests test is seriously deficient on all counts. It thus has become abundantly clear that the interest-balancing test laid down almost 25 years ago has proved unworkable. Then-Justice Rehnquist's dissent in *Colville*, 447 U.S. at 176-88, is prescient in this regard. *White Mountain Apache* has produced protracted litigation in which neither side can, nor will, acknowledge that the

balance-of-interests favors the other. This flight to litigation is encouraged by the interests balancing test itself, which has devolved into a case-by-case, highly subjective exercise generating unpredictable outcomes.

When governing decisions are unworkable this Court has never felt constrained to follow precedent. *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (*Payne v. Tennessee*, 501 U.S. 808, 828 (1991) quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). *Stare decisis* is not an inexorable command in the area of constitutional law) *Payne* at 828. It is the preferred course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827. Kansas submits that the *White Mountain Apache* interest-balancing test fails to achieve any of those salutary purposes in the taxation context where, more than any other area of civil regulation, concrete and reasonably *per se* rules are essential.

States cannot administer their statutes effectively when one party can alter circumstances or create novel theories that ostensibly "shift" the balance against the state tax. They need a clear, bright-line test, as this Court held in *Chickasaw Nation*, 515 U.S. at 460. Balancing does not provide it. The appropriate approach is instead to follow a straightforward preemption standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax ultimately may be borne by the Government. *See*

Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37-38 (1999).[4]

When it has served the greater good, this Court has never shied away from using bright-line tests and, in fact, endorses their use when they promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court reasoned:

> [W]e have never intimated a desire to reject all established 'bright-line' tests. . . . Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority . . . . This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

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[4] As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the economic burden of the tax through to a person who is exempt from tax. *See United States v. Detroit*, 355 U.S. 466, 469 (1958); *cf. Colville*, 447 U.S. at 151 ("[t]he State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.").

Id. at 314-16. The rationale for using a bright-line test to limit state jurisdiction in certain circumstances applies equally to preserve and protect state jurisdiction. Adopting traditional preemption standards in lieu of the *White Mountain Apache* balancing architecture will further the important interests animating *Quill*'s holding and comport with this Court's historical philosophy of providing ascertainable, workable parameters for state tax administration.

The efficacy of a bright-line approach here is reflected in a paradigm of the layered complexity attendant to the *White Mountain Apache* test, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

> In our case the following facts favor preemption:
>
> 1. The fee is held by the United States in trust for the Tribe.
>
> 2. The Tribe has furnished the site for the Hotel.
>
> 3. The Tribe has ownership of the Hotel, its facilities, and all improvements.
>
> 4. The Tribe has a residual interest in the assignment of the lease.
>
> 5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

> 6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.
>
> 7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.
>
> 8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

> 1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The manager of the Hotel was not aware of any employee from the Tribe.
>
> 2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.
>
> 3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.
>
> 4. The Tribe receives only a guaranteed 1-1/4 percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."
>
> 5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

(a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.

(b) The law . . . . and other security instruments such as the mortgages by which the Hotel is financed.

(c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, not unlike the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's "active role in *generating activities of value* on its reservation[;]" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services 'critical' to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting). It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and tax administrators with no real guidance when attempting to conform their actions to applicable federal law.

As is evident from *Yavapai-Prescott*, the *White Mountain Apache* standard not only engenders litigation of tremendous factual complexity but also compounds that complexity with largely uncontrolled judicial discretion in

identifying and weighing those facts deemed most significant.[5] This potent combination plainly leads to unpredictable judicial decision-making. Consequently, such a case-by-case approach ultimately serves to encourage development of new legal or factual theories by those aggrieved by state-law exactions and more litigation – a result antithetical to the States' interest in a stable and efficient tax system.

In this case, the district court correctly determined – and the court of appeals did not dispute – that the State's exercise of jurisdiction through the legal incidence of the Kansas tax at issue falls on non-Indian distributors on transactions occurring off-reservation, rather than on Respondent. J. A. 119. Indeed, no other conclusion seems possible here, given that the tax is not imposed on any activity occurring on tribal lands and Respondent is not required to collect or remit the tax to the State. The court of appeals, while ignoring the fundamental differences from the case at bar, cites *Colville*, *Cabazon Band*, and *Chickasaw Nation* to support its conclusion that the balance-of-interests test strikes the State tax imposed off-reservation.

---

[5] The decision below illustrates graphically the potential complexity. The court of appeals relied heavily on a "reservation value added" theory – *i.e.* the proposition that most fuel purchasers were drawn to the reservation by the casino and not simply a price differential attributable to a lower tribal tax – to invalidate the Kansas tax. The elastic nature of that notion hardly needs detailed elaboration. Under the court of appeals' approach, States likely will be required either to adduce or rebut evidence related to, *inter alia*, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each separate permutation's "uniqueness" effectively vitiate any notion of predictability for tax administration purposes.

Each of those cases involve either (1) state regulation of activity occurring on tribal land; or (2) a requirement that tribes collect and remit taxes to the State from transactions arising on-reservation; or (3) both. In this case, by contrast, the only connection between the Kansas tax and Respondent is that some distributors sell motor fuel to Respondent and may charge a cost that passes through the tax's economic burden. The State is not attempting to regulate any activity on tribal lands, is not attempting to exercise jurisdiction over Respondent or its members, and is not requiring Respondent to collect and remit taxes to the State.

The court of appeals rested its decision largely on the notion that the transient economic burden of an off-reservation state tax harmed Respondent's economic viability (*i.e.* its profits), and was sufficient to preempt the off-reservation state tax. The court of appeals' conclusion was created out of whole cloth via the balance-of-interests test. It is the only way that the state tax here could be preempted, because there was no controlling authority to support any other method of preemption.

To further support its decision that the federal interests weigh in on the side of the Respondent, the court of appeals cited to various federal statutes, a Presidential Proclamation, and an Executive Order as reflecting a generalized federal interest in tribal economic development and self-sufficiency.[6] Inasmuch as these statutes,

[6] *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 986 (10th Cir. 2004) ("These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001);

(Continued on following page)

proclamations and orders are wholly unrelated to a State's administration of its laws off-reservation, and none addresses, even remotely, motor fuel sales and distribution, the court of appeals' reliance on them is misplaced.[7] Further, while Kansas does not dispute that the federal government has a generalized interest in tribal economic development and self-sufficiency, it does posit that the federal government has a compelling interest in avoiding interference with state taxation policy outside Indian country.

The court of appeals' rationale clears the way for a host of tribal challenges to state taxes that are not imposed on tribes but that may indirectly affect tribes and non-Indians who do business with tribes. For instance, an increase in gasoline distributors' state property, sales or income taxes generally results in an increase in the price

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed.Reg. 57641 (Nov. 15, 2001) ('We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.'); Presidential Executive Order 13175, 65 Fed.Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ('[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.')").

[7] *See Colville*, 447 U.S. at 155 ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.")

that distributors charge their customers for gasoline. Because this may cause tribal retailers to pay higher prices for their gasoline, the court of appeals' reasoning allows tribes to challenge any state tax that their supplier has to remit to the State.

Two simple examples cited by the court of appeals as supporting preemption actually serve to illustrate inherent flaws of balancing: First, The court of appeals found that Respondent's fuel price is within two cents of market. J. A. 40, 139-40. But what if it was four cents, six cents, eight cents, a dime below market? At what amount does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? What is the market? Is it the reservation, the county in which the reservation is situated, the State? Second, Respondent's fuel station was adjacent to its casino. J. A. 133. What if Respondent's fuel station was a quarter of a mile from its casino, a half-mile, one mile, two? How close does it have to be? When is it far enough away that it no longer "draws value" from a tribal casino? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? Is a state tax preempted if the gas station is adjacent to a tribal businesses other than a casino? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

Further, the balance-of-interests test leaves business taxpayers in limbo. The balance-of-interests test provides them no voice or discernable predictability, yet they are expected to write the check. How is a business supposed to know which way the balance will "tip" at the time they purchase property or services that may subsequently end

up on a reservation? How are they to discern which facts among the legion available will be determinative? Do they simply wait until years of litigation culminate in a decision? Do they remit the tax and risk offending future customers, or do they take the risk of running afoul of state law by not remitting the tax? How can business taxpayers know how and to what extent to make business plans when the "balance" can be changed from time to time depending on creative legal theories or ever-shifting factual scenarios?

Placing the States and taxpayers in such a conundrum hardly provides for the evenhanded, predictable, and consistent development of legal principles, and does not foster reliance on judicial decisions, nor contribute to the actual and perceived integrity of the judicial process.

Finally, the difficulty for state tax administrators resulting from the *ad hoc* litigation model can be seen by contrasting this case with *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir. 2000). The court of appeals in *Sac and Fox* determined that unless the plaintiff tribes there could prove that they sold a substantial portion of their fuel to tribal members, distributors in Kansas were required to remit fuel taxes on fuel delivered to tribal gas stations owned by the tribes, despite the fact that those gas stations were located near other tribally owned businesses. *Id.* at 583. Now, however, the same court has said that because a gas station adjoins Respondent's tribally owned business, tribal interests can reach across reservation boundaries under the rubric of "reservation value added" and invalidate the same tax imposed off-reservation on the same distributor. The courthouse door thus remains always open for tribes to continue to alter facts, to create novel theories and to re-litigate until they hit upon a mixture of factors that, in a particular court's eyes, merits striking

down state tax in question. The specter of continuing litigation of this sort counsels abandonment of the *White Mountain Apache* balance-of-interests test.

This Court should, therefore, replace the *White Mountain Apache* balance-of-interests test with the straightforward, traditional federal preemption standard based on the preemption standards recognized in *United States v. New Mexico*. Such an approach provides clear guidance, precise lines of demarcation, and largely predictable results for States, business taxpayers and tribes. The Court thus observed in *Blaze Construction*, where it declined to extend *White Mountain Apache* to resolve a preemption challenge to a state tax imposed on a Bureau of Indian Affairs road-construction contractor, that "[i]nterest balancing in this setting would only cloud the clear rule established by our decision in *New Mexico*." 526 U.S. at 37. There is, in this regard, no substantial justification for imposing a less stringent preemption standard with respect to Indian tribes or their members than for the Federal Government. *See Ramah Navajo*, 458 U.S. at 847 (Rehnquist, J., dissenting) (criticizing application of *White Mountain Apache* rather than *New Mexico* standards, since holding "accord[ed] a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here.").

Adoption of *New Mexico* principles will recognize the States' compelling interest in a readily-ascertainable sphere of taxing authority and the inappropriateness of rebalancing arguably competing interests from case to case. This approach will also be consistent with both the "categorical" rule (*Chickasaw Nation*, 515 U.S. at 450) adopted by the Court against direct state taxation of tribes and

their members with respect to reservation property and transactions absent congressional authorization and the similarly *per se* rule permitting state taxation of nonmember on-reservation property or activities that are not related to a commercial or other relationship with the resident tribe (*County of Yakima v. Confederated Tribes and Bands of Yakama Nation*, 502 U.S. 251, 257-58 (1992)).

III. CONTRARY TO CONTROLLING PRECEDENT FROM THIS COURT, THE COURT OF APPEALS' DECISION WRONGLY PLACED RESPONDENT'S ECONOMIC INTEREST IN A POSITION SUPERIOR TO THE STATE'S STRONG, FUNDAMENTAL INTEREST IN ITS SYSTEM OF OFF-RESERVATION TAXATION.

Assuming *arguendo* that the court of appeals was correct in balancing the State's off-reservation interests in administering its system of taxation, it misapplied the *White Mountain Apache* test by, most importantly, misconstruing the reservation-generated value element discussed in *Colville*. The court reasoned that because Respondent's gas station sits near the tribal casino, casino patrons are drawn to the gas station by the casino and that, therefore, such proximity creates "value generated on the reservation" sufficient to trump the state tax imposed on off-reservation transactions.

This Court addressed the justification denominated by the court of appeals as "value generated" over a century ago in *Thomas v. Gay*, 169 U.S. 264 (1898). There, it was argued that the Organic Act of Oklahoma precluded territorial taxation of cattle grazing on Indian reservation land as impairing "any right now pertaining to any Indians." It was claimed that Indians were directly and vitally

interested in the property sought to be taxed; that the Indians' rights and rights of property would be seriously impaired by the territorial tax; that the money received by the tribe from the grazing leases were to be used by the tribe for tribal uses and tribal government services; that the federal government's interest in tribal issues precluded territorial taxation; and that if the territorial taxes were allowed to be imposed it would devalue the reservation lands, the tribe would not get as much profit, and its leases and revenue flow would fluctuate or be completely destroyed. *Id.* at 271-73. The *Thomas* Court nonetheless swept aside all of the above arguments against the territorial tax, holding that a tax upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. *Id.* at 273. The Court likewise held that the character of the territorial tax in no way impeded Congress' plenary power over the Indians. *Id.* at 274-75. Slightly less than a decade later, the analysis and conclusion in *Thomas* were followed in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906).

The circumstances here present an equally, if not more, compelling basis for the same conclusion. In *Thomas*, the cattle sought to be taxed by the territory were actually on the tribe's reservation consuming, literally, resources especially connected to the tribe's land (*i.e.* grass). Here, there is no evidence that the motor fuel is a natural resource especially connected to Respondent's land.

The receipt of fuel here is taxed by the State *off*-reservation. Kansas is *not* attempting to tax Respondent's sales on the reservation or the resulting profits. In *Thomas*, no reservation "value" (*i.e.* the land or the rents paid to the tribe) were sought to be taxed by the Territory even

though the underlying transaction did take place on reservation. The tribe, in other words, had no property right or expectation in the commodity sought to be taxed by the Territory. Similarly, Respondent has no property right in the fuel at the time the State levies its tax. Finally, in *Thomas* the fact that the tribe might lose revenues was found irrelevant because the territorial tax was too remote to infringe on the tribe's rights and property. The same is true in this matter.

Nearly a century later, the underlying rationale of *Thomas* was confirmed, and similar arguments raised by a tribe were rejected, by this Court in *Colville*. 447 U.S. at 154-59. In dispute there was the State of Washington's imposition of a cigarette sales tax on *on*-reservation purchases by tribal nonmembers of the tribes. The Court phrased the issue as whether an Indian tribe ousts a State from any power to tax *on*-reservation purchases by nonmembers by levying its own tax on the transactions or by otherwise earning revenues from the tribal business. *Id.* at 154. The court of appeals below distinguished *Colville* on two grounds: First, in contrast to the smokeshops, Respondent is not marketing an exemption from state taxes, J.A. 139; and, second, Respondent is not merely importing a product for resale to non-Indians, J.A. 140. Neither of these distinctions withstands even casual scrutiny.

As to the first distinction, limiting the inquiry to whether Respondent is "marketing an exemption," is a slippery slope that no court has ventured to traverse. *See, e.g., Chemehuevi Indian Tribe v. California State Bd. of Equal.*, 800 F.2d 1446, 1450 (9th Cir. 1986) ("[w]ere we to accede to the tribe's arguments and distinguish *Colville* on the grounds that in *Colville*, non-Indian purchasers were attracted to the reservation solely to purchase tax-free

cigarettes, we would raise the specter of drawing distinctions on a case-by-case basis, relying on such factors to allow or disallow state taxation as whether non-Indian customers resided on or off reservation, the existence of other tribal amenities attracting visitors to the reservation, the length of time visitors spent on the reservation, the level of state funding of reservation, and the amount of tribal effort devoted to marketing the product."). The fact that a tribe attempts to entice individuals to do business on reservation through a tax differential constitutes only one factor that bears upon the preemption challenge's outcome. *See Colville*, 447 U.S. at 155 ("The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas.").

The second purported distinction cannot be squared with the facts in the record. As previously discussed, the "value" the court of appeals attributed to the fuel was the fact that it was dispensed near the Respondent's casino. Nothing in the record suggests, much less establishes, that Respondent creates, manufactures, enhances or alters in any manner the fuel itself. There is nothing in the record that Respondent's gasoline sales are in any way especially connected with its land, or the regulation or harvesting of any natural resource on that land. Indeed, the district court specifically *found* that Respondent simply imports the finished fuel product and offers it for sale to ultimate users. J.A. 91, 114. Equally important, *Colville* did not hold that the existence of reservation generated value automatically

warrants preemption. This Court instead identified such value, deemed the "strongest" consideration in support of preemption, at the same time that it identified the "strongest" ground for upholding the state tax as the provision of governmental services. 447 U.S. 156-57 (on one hand, "[w]hile the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services[;]" on the other hand, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services."). *Colville* did not address the question whether, when these interests stand in counterpoise, one or the other prevails. That question, however, was answered definitively almost two decades later in *Cotton Petroleum* – a decision unmentioned by the court of appeals notwithstanding its "pathmarking" status. (*Montana v. Crow Tribe*, 523 U.S. 696, 715 (1998)).

In *Cotton Petroleum*, this Court removed any doubt that the mere presence of reservation generated value is sufficient to preempt a state tax whose legal incidence is borne by a nonmember. The presence of such value was undisputed there, since the involved state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases,

the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What *was* dispositive was the fact that New Mexico provided "'substantial services'" to the tribe and the mineral lessee. *Id.* at 185. These same principles have been applied subsequently where an excise or other type of state taxation is in question. *E.g.*, *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (stamped cigarette allocation scheme); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (transaction privilege tax). The decision below applying *White Mountain Apache* cannot be reconciled with *Cotton Petroleum* for obvious reasons.

The court of appeals gave no weight to the fact that the state taxpayer, the distributor, and Respondent's patrons are afforded many state benefits, chief of which is four-lane State Highway 75 to get to Respondent's casino and gas station.[8] That state highway is paid for with state fuel taxes. Kan. Stat. Ann. § 79-3402 (1997). The significance of this fact was noted by the district court. J. A. 114-15, 118. Moreover, a prior panel determined that customers of tribally operated gas stations largely use state highways and services paid for by state fuel taxes. *Sac and Fox Nation*, 213 F. 3d at 585 and n.15. In striking contrast, the court of appeals here placed dispositive weight on the one-and-a-half-mile access road built by Respondent from

[8] While it is the largest roadway on and near Respondent's reservation, State Highway 75 is only one of many state and local roads paid for by state motor fuel taxes on and near the reservation that its patrons use in traveling to and from the casino.

State Highway 75 to its casino and gas station and the fact that Respondent's gas station would have few customers if not for the casino. The appellate panel gave no discernable weight to the state services without which the access road would lead nowhere and would have no traffic to justify its very existence. How many casino patrons would be "drawn" to Respondent's gas station or casino if they had to walk from Topeka or Wichita or other points in Kansas to the access road, instead of using a modern, four lane, state-of-the-art state built and maintained highway?

The court of appeals thus ignored not only the overall highway infrastructure, both on and off reservation, essential for the access road or the casino itself to have "value" but also the fact that, under *Cotton Petroleum*, the provision of such infrastructure and the dedication of the motor fuel tax to its upkeep more than amply justified Kansas' right to tax the distributor.

Beyond its failure to recognize the significance of *Cotton Petroleum* and the dispositive nature of the services provided the distributor specifically and the tribal facilities' patrons generally, the court of appeals failed to appreciate, or at least to analyze, that the distributor here is the state taxpayer and that the ultimate consumer – *i.e.* the gas station patron – is the tribal taxpayer. This case accordingly presents a situation where taxes are imposed by two different sovereigns at two different points in time in two different locations, one off – and the other on – reservation, with respect to two different transactions that involve two different sets of taxpayers. The only common feature of the taxes is that their amount is determined, in part, by the volume of gas received (by the distributor) or purchased (by the tribal station's patrons). The state and tribal taxes thus cannot be characterized as "concentric" or

"concurrent." The state tax is, at the end of the day, merely another element of the price of doing business for motor fuel retailers. Respondent ought to stand in no favored position in comparison to other retailers who do business with the distributor merely by virtue of its tribal status.

* * *

Taxation is a core sovereign interest of every State. The real effect of the court of appeals' decision here is to preclude the collection of a validly enacted state tax – not even imposed on Respondent and not even requiring its assistance in collecting it – thereby depriving Kansas of substantial tax revenue that it would otherwise collect. This Nation's system of federalism does not support such a conclusion, and the court of appeals erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeal For The Tenth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA, IN SUPPORT OF PETITIONER, RICHARDS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
AMICI CURIAE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA	1
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	9
I. THE TENTH CIRCUIT INVENTED AND APPLIED A PRE-EMPTION JURISPRUDENCE PREVIOUSLY UNKNOWN, WITH FAR-REACHING AND DISASTROUS CONSEQUENCES	9
A. *Colville* Requires An Accommodation Of Kansas' Interest In Raising Revenues To Support Essential State Services, Which Is Achieved By Comparing And Balancing Those Interests With Those Of The Tribe	10
1. The State may tax on-reservation economic activity of non-tribal members irrespective of the economic impact on the Tribe	10
2. The Court must balance the interests of Tribes and States in raising revenue and determine, in the case of conflict, which interest predominates	11

TABLE OF CONTENTS – Continued

Page

B. The Tenth Circuit Invented A New Concept Of Product Value Inconsistent With This Court's Precedent 13

1. Product value in *Colville* consists of the activities of businesses that add to the marketable price of a product 13

2. The Tenth Circuit misunderstood product value and ignored where it was contributed, relying only on why the product was purchased 15

C. The Tenth Circuit Failed To Compare The Provision Of Governmental Services To The Purchasers Of Motor Fuel By The Tribe And By Kansas 19

D. The Tenth Circuit Ignored That The Significant Geographic Component Of Sovereignty Favors Kansas 21

E. There Is No Tradition Of Tribal Sovereignty Involved In Sales Of Motor Fuel Purchased Off-Reservation 22

F. If Upheld, The Tenth Circuit's Ruling Will Lead To Unmanageable And Unpredictable State Taxation, Commercial Chaos, And Endless Litigation 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 6, 17

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 21

Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989) 21, 22, 23

Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996) 19

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 11

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 5, 9, 18

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 18, 22

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 26

Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979 (10th Cir. 2004) 15, 16, 19

Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) 21

Rice v. Rehner, 463 U.S. 713 (1983) 22, 23

Salt River Pima-Maricopa Indian Community v. State of Arizona, 50 F.3d 734 (9th Cir. 1995) 19

Trinova Corporation v. Michigan Department of Treasury, 498 U.S. 358 (1991) 13

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) ..... *passim*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 22

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997), *certiorari denied*, 522 U.S. 1076 (1998) 19

STATUTES

Indian Trader Statutes: 25 U.S.C. §§ 261-264 10

OTHER AUTHORITIES

Energy Analysts International, *The Convenience Store Industry vs. Hypermarkets: Strategies for Competition* (2002) 3, 25

MapQuest.com 4

Merriam-Webster OnLine, http://www.webster.com 13

AMICI CURIAE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

This *amici curiae* brief is submitted on behalf of the National Association of Convenience Stores (NACS), the Petroleum Marketers Association of America (PMAA), and the Society of Independent Gasoline Marketers of America (SIGMA) in support of Petitioner, Stephen Richards, in his official capacity as Secretary, Kansas Department of Revenue (Kansas), seeking reversal of a ruling by the United States Court of Appeals for the Tenth Circuit. Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all the parties.[1]

INTEREST OF THE *AMICI CURIAE*

NACS is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. Its retail members operate more than 130,700 convenience stores worldwide. The majority of NACS retail members sell motor fuels (gasoline and diesel

[1] Copies of the consent letters have been filed with the Clerk of the Court with this brief. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

fuel); NACS member companies collectively sell approximately 220 billion dollars worth of motor fuels in the United States each year. Overall, more than 100,000 convenience stores in the United States sell motor fuels.

PMAA is a national federation of 45 State and regional trade associations representing 8,000 independent petroleum marketers. Most PMAA member marketers conduct business as both wholesalers and retailers. PMAA members sell or supply over 56 percent of the gasoline, 60 percent of the diesel fuel, and 80 percent of the heating oil consumed in the U.S. each year. Independent petroleum marketers are mostly small businesses, many of which are also family-owned businesses.

SIGMA is an association of more than 250 independent motor fuel marketers operating in all 50 States. Last year, SIGMA members sold more than 48 billion gallons of motor fuel, which represents more than 30 percent of all motor fuels sold in the United States in 2004. SIGMA members supply more than 28,000 retail outlets across the nation and employ more than 270,000 workers nationwide.

Every State imposes volume taxes on motor fuels (both gasoline and diesel fuel) and these State taxes constitute a large proportion of the price of motor fuel. On average, State taxes per gallon are greater than the per-gallon profits of retailers. The Tenth Circuit has held that a Tribe may enjoin these and any other tax that increases the price that a Tribe pays for motor fuel or that it charges to its purchasers if the Tribe's reservation includes some enticement to reservation travel other than tax exemptions on motor fuels. This holding would exempt Tribes from volume taxes and every tax imposed on every aspect relating to the discovery of crude oil, its production,

refinement to motor fuel, transportation, marketing, and sale.

The Tenth Circuit's decision would likely bankrupt many of *amici's* members. Consumer research demonstrates that price differentials of one to two cents per gallon are sufficient to cause consumers to shift where they purchase motor fuel. Energy Analysts International, *The Convenience Store Industry vs. Hypermarkets: Strategies for Competition*, 15-1 (2002). That is consistent with the price advantage the Prairie Band of the Potawatomi Nation has over its competitors due to its tax advantage in Kansas and is enough to cause significant competitive advantages for the Tribe. With 55.7 million acres of land in trust for the 562 federally recognized tribes, there are numerous options for tribes to competitively place motor fuel retail outlets and to drive *amici's* members out of business. A large percentage of *amici's* retail members' sales are of motor fuels,[2] and more than 75,000 of these retailers are single-store operators who will not be able to make up for lost sales by increasing sales at other locations. Many of them simply will not be able to compete. It is, therefore, critical to *amici* that the Tenth Circuit decision be reversed.

STATEMENT OF THE CASE

Kansas imposes a tax on the "first receipt" of motor fuel in Kansas by all wholesale distributors of that motor fuel and does not prohibit those distributors from passing some or all of that tax on to the purchasers of that motor

[2] That percentage is 62.4 for convenience stores in 2002.

fuel. The proceeds of this tax are used exclusively for construction and maintenance of roads in Kansas and its political subdivisions.

The Prairie Band of the Potawatomi Nation (the Tribe), like all other motor fuel retailers in Kansas, purchases motor fuel from these wholesale distributors for retail sale. This motor fuel is retailed primarily to non-tribal members, who bear the economic impact of the tax. The Tribe's motor fuel sale profits are used solely for construction and maintenance of reservation roads, including a one mile road from Highway 75, to a casino operated by the Tribe.[3] However, nearly all on-reservation motor fuel purchasers travel to the reservation on roads provided and maintained by Kansas.

While the location of the reservation, in Jackson County, Kansas, is technically rural, it is near several large urban centers, such as Kansas City (87 miles, metropolitan area population in Missouri and Kansas of nearly 1.8 million), Lawrence (50 miles, pop. 81,000), Topeka (20 miles, pop. 123,000), Manhattan (70 miles, pop. 45,000), and Wichita (168 miles, pop. 344,284).[4] Travel to and from these cities can be accomplished easily with one tank of gas. Moreover, there are many motor fuel stations between these points of origin and the reservation, including those adjacent thereto in Mayetta, Kansas.

[3] Because the Tribe owns the motor fuel and the station that dispenses it, its claim that the profits from its sale of its motor fuel constitute tax revenue is disingenuous. The Tribe may not convert profit to tax revenue merely by purporting to tax itself.

[4] Population figures are from the 2000 Census; distances are from MapQuest.com.

Kansas constructed and maintains, using the proceeds of the wholesale distributor motor fuel tax, state Highway 75, a four lane highway that passes along the eastern edge of the Tribe's reservation, which the Tribe's one mile road to its casino joins. Highway 75 is the main access to the reservation from Topeka. The main access to Topeka, hence the casino, from Kansas City and Lawrence is the Kansas Turnpike, which is a high-speed, high-capacity highway, maintained partially using Kansas' wholesale distributor motor fuel tax. Interstate Highway 35, also maintained with Kansas' motor fuel tax revenues, connects Wichita to Topeka. Thus, the reservation is accessible to most urban centers in Kansas by high-speed, high-volume highways maintained by taxes imposed and collected by Kansas. Kansas also maintains other roads providing access to the reservation, including from Manhattan and smaller, less urban areas. Kansas provides snow removal, law enforcement, and courts in connection therewith.

SUMMARY OF THE ARGUMENT

Kansas is correct that a tax imposed on non-Indian, off-reservation economic activity is controlled by *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Kansas' first receipt tax on wholesale distributors of motor fuel is not pre-empted unless Congress expressly exempts it, which it has not done. *Amici* also support the reasoned argument of Kansas that, if *Jones* does not control the balancing test set out in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and its progeny, should be abandoned in favor of a *per se*, bright-line rule

that does not pre-empt state taxation unless Congress has stated unequivocally its intention to do so.

If the *Colville* balancing test must be applied, however, the Tenth Circuit failed to do so, and circumvented *Colville's* requirement to accommodate State interests in raising revenues with Tribal interests in raising revenues by inventing unprecedented new tests for: (1) determining the on- and off-reservation value of motor fuel and comparing governmental services provided by the Tribe and State to the producers of that value; (2) comparing the governmental services provided by the Tribe and State to the on-reservation purchasers of that motor fuel; and (3) balancing the results of these determinations and comparisons. *Colville*, 480 U.S. at 156-57. In postulating these imaginative tests, the Tenth Circuit ignored or misunderstood *Colville's* holding and its reasoning. It then compounded this error by relying instead on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which is entirely inapposite, to hold incorrectly that the Tribe's motor fuel station and its casino are one and the same for the purpose of determining the value added by the reservation to motor fuel sold on-reservation.

The Tenth Circuit, ignoring *Colville*, grounded its analysis in the surprising proposition that the off-reservation value of motor fuel created by discovering, producing, transporting, refining, marketing, and distributing it to off-reservation wholesalers and from them to the Tribe, is lost once delivered to the Tribe, acquiring solely on-reservation value when it is purchased by persons traveling to the reservation to attend some

reservation attraction.[5] The Tenth Circuit concluded, without any explanation or reference to the record, that any product, purchased off-reservation and sold on-reservation, becomes integral and essential to the reservation attraction and thereby is invested with reservation value. Thus, the Tenth Circuit concluded that, because the motor fuel station is part of the casino, motor fuel delivered there is divested of all off-reservation value and is invested instead with the on-reservation value of the casino. The Tenth Circuit exacerbated this error by failing to compare the governmental services provided by the Tribe and Kansas to the producers of motor fuel value. As a result, the Tenth Circuit's ruling repudiates *Colville's* first prong, which requires a finding that any value added to the motor fuel by the Tribe was *de minimis*; that Kansas provided nearly all the governmental services to the producers of motor fuel value; and that Kansas' interest in this respect is overwhelmingly paramount.

The Tenth Circuit also failed to address the second prong of the *Colville* test – a comparison of the services provided to purchasers of the motor fuel by the Tribe and State. Rather, the Tenth Circuit merely observed in passing that, because motor fuel purchasers did not leave immediately after purchasing motor fuel, but stayed for some time to gamble, the Tribe provided services to them. However, the Tenth Circuit neither discussed the amount of such services, their nature, and how the Tribe's motor

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[5] In this case, a tribally owned and operated casino was the attraction. Under this view of reservation value, any feature of the reservation or activities thereon that provides a reason to travel to the reservation, including the reservation itself, imparts solely reservation value to the motor fuel.

fuel sale profits contributed thereto, nor addressed the extent and nature of the services provided by Kansas and the relation of its tax thereto. Had the Tenth Circuit made the comparison required by *Colville*, it would have found that Kansas provided a highly disproportionate amount of services to those purchasers, which was related directly to and supported by the tax in question.

The Tenth Circuit ignored the third prong of *Colville* altogether and did not balance the comparisons of the first and second prongs. Thereupon the Tenth Circuit erroneously concluded that Kansas' tax was pre-empted by federal law.

If upheld, the Tenth Circuit's decision would allow Indian Tribes to enjoin all taxes imposed at every stage of the production of value in crude oil from its discovery to its sale to the Indian Tribe, simply because the purchase price of motor fuel paid by the Tribe included some part of these taxes, thereby reducing the profit of the Tribe from motor fuel sales. This result would destroy competition from non-Indian competitors, such as *amici*, would disrupt State tax administration, would interfere with the States' ability to raise revenue, and would create commercial chaos. This Court must, therefore, reverse the Tenth Circuit and hold the Kansas tax valid and enforceable.

ARGUMENT

I. THE TENTH CIRCUIT INVENTED AND APPLIED A PRE-EMPTION JURISPRUDENCE PREVIOUSLY UNKNOWN, WITH FAR-REACHING AND DISASTROUS CONSEQUENCES.

Amici agree with Kansas that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), controls because Kansas' motor fuel tax has no on-reservation aspect except an indirect economic impact. Congress must unequivocally state that such a tax is pre-empted. It has not so stated. *Amici* further agree with Kansas that, if the categorical rule set out above does not apply, the balancing test previously developed by this Court is too unpredictable and unreliable, leading to capricious and unreliable rulings, such as that of the Tenth Circuit here. Accordingly, *amici* adopt the reasoned analysis of Kansas on this point, requesting this Court to adopt this bright-line, categorical rule: "There is no federal pre-emption unless Congress unequivocally so states."

If a balancing test were applied correctly in this case the Tenth Circuit's decision would not be sustained. The Tenth Circuit reached its result by inventing a new concept of product value and a new test to adjudicate conflicts between Tribal and State sovereignty interests in raising revenue for essential governmental services. In doing so, the Tenth Circuit sought, unsuccessfully, to distinguish *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). However, the Tenth Circuit was plagued by a fundamental misconception of the holding and the reasoning of *Colville*.

A. *Colville* Requires An Accommodation Of Kansas' Interest In Raising Revenues To Support Essential State Services, Which Is Achieved By Comparing And Balancing Those Interests With Those Of The Tribe.

In *Colville*, federally licensed Indian Traders engaged in the on-reservation sale, predominantly to non-tribal members, of cigarettes supplied by several Washington Tribes.[6] The Tribes imposed a tax on cigarette purchasers, though the tax was imposed on the Trader in one case. This tax provided vitally needed revenues for the Tribes, which were expended for essential governmental services.

The State of Washington also imposed a tax on cigarette purchasers. Because the low sale price was the only reason purchasers journeyed to the reservation, if the Washington tax were collected, on-reservation cigarette purchases by non-tribal members would end, along with the main source of Tribal revenues for essential governmental services. The Tribes argued that, while both the Tribe and the State had an interest in taxing to raise revenue for essential governmental services, federal law supporting tribal self-determination and economic development pre-empted the State's interest. This Court rejected both arguments.

1. The State may tax on-reservation economic activity of non-tribal members irrespective of the economic impact on the Tribe.

Here, because the legal incidence of Kansas' tax is off-reservation and the ultimate burden falls primarily on

[6] Indian Trader Statutes: 25 U.S.C. §§ 261-264.

non-Indian purchasers of goods, and not on the Tribe or its members, "the [Tribe's] primary argument is economic." *Colville*, 447 U.S. at 154. Therefore, the categorical exemption from direct state taxation of Tribes or their members for on-reservation economic activity, formulated in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), does not apply. Thus, "there is no automatic bar" to a Kansas tax of on-reservation economic activity of non-Indians. *Id.* at 151. Indeed, Kansas could tax on-reservation economic activity of non-Indians, "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians," because "Tribes have no vested right in a certain volume of sales to non-Indians, or indeed any such sales at all." *Id.* at 151 and n. 27. Because Kansas' wholesale distributors motor fuel tax is on the off-reservation economic activity of non-Indians, the Tribe's economic argument may not prevail under *Colville*.

2. The Court must balance the interests of Tribes and States in raising revenue and determine, in the case of conflict, which interest predominates.

Colville recognized that both the Tribes and States have a critical interest in raising revenues for essential governmental services. Therefore, when a State tax of on-reservation economic activity of non-Indians has the indirect effect of reducing Tribal revenue, "[t]he principle of tribal self government, grounded in notions of inherent sovereignty and in congressional policies, [requires] accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 156. This accommodation is

achieved by the use of this Court's sliding scale, which measures and balances these interests:

> The Tribe's . . . interest in raising revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State['s] . . . legitimate governmental interest in raising revenues . . . is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-57.

Thus, when State taxes indirectly impact the price Tribes pay for motor fuel or charge on-reservation purchasers for motor fuel, a court must engage in three comparisons. First, the court must determine the extent to which the motor fuel's value, that is, its market price, is derived from off-reservation economic activity and the extent to which the value is derived from on-reservation activity, and then compare the amount of governmental services provided these activities by the Tribe and the State. Second, the court must compare the services provided by the Tribe to the retail motor fuel purchasers on whom the economic impact of the tax falls with the services provided to those purchasers by the State. Finally, the court must balance the results of these two comparisons, determining whether, overall, the Tribe's interest in raising revenues outweighs that of the State.[7] *Colville* 447

[7] The severity of the economic impact on the Tribe or the State is not part of the calculus.

U.S. at 156-157. Here, the balance overwhelmingly favors Kansas on all points.

B. The Tenth Circuit Invented A New Concept Of Product Value Inconsistent With This Court's Precedent.

1. Product value in *Colville* consists of the activities of businesses that add to the marketable price of a product.

The common understanding of product value is set forth by Merriam-Webster OnLine[8] as "the monetary worth of something: marketable price." Thus, to determine "reservation value" in an off-reservation product, such as motor fuel, the court must compare the value added to the purchase price by on-reservation activities with the value added by off-reservation activities. "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." *Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358, 362 (1991). Thus, "a business adds value by handling or processing these goods with its labor force, machinery, buildings and capital." *Id.* "Value added is a measure of actual business activity. . . ." *Id.* "[T]he sales price of a product is the total of all value added by each step of the production process to that point."[9] *Id.* One particular tax, the value-added tax (VAT), taxes each business' addition to

[8] http://www.webster.com.

[9] "The value added to a loaf of bread . . . includes the contribution of the farmer, miller, baker, wholesaler and retailer." *Id.*

the product value.[10] "The logic of the VAT rests squarely on the benefits received principle of taxation – government services are essential to the operation of any business enterprise . . . and a part of these public service costs should properly be included in the cost of doing business." *Id.* at 364.

Understanding how value is added to a product and that the producers of that value receive governmental services that enhance that value clarifies why *Colville* placed such importance on determining where and how marketable price was created; the government that provides the bulk of the services to those who create marketable value should be favored heavily in determining which government's interest predominates and, hence, prevails.

The value of motor fuel at the Tribe's retail pump is the result of extensive effort and cost off-reservation, where nearly all value is added. Undiscovered crude oil has little value. It must be discovered, drilled, extracted, transported for refinement, refined, marketed, and transported to wholesalers and again to retail outlets. This entails extensive capital and labor expenditures at every stage of the process and corresponding utilization of State services, including roads. These investments all add to the product value of crude oil, which eventually becomes motor fuel sold by the Tribe. On the other hand, the Tribe adds *de minimis* value to the crude oil by selling it at the Tribe's pumps. The product value comparison of *Colville* tremendously favors Kansas.

[10] While this is primarily a tax of European application, its theory is instructive here.

2. The Tenth Circuit misunderstood product value and ignored where it was contributed, relying only on why the product was purchased.

The Tenth Circuit invented its own concept of reservation-added value, vainly attempting to distinguish *Colville*. The Tenth Circuit held that, if the Tribe provided any activity that attracted non-Indian consumers, who then purchased motor fuel, then all off-reservation value added to the crude oil is divested instantly and is invested in the reservation instead. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 984-985 (10th Cir. 2004). This is not only a *non sequitor*, it fundamentally distorts the holding and reasoning of *Colville*.

The Tenth Circuit wrote that, "in stark contrast to the smokeshops in *Colville*, the [Tribe] is not marketing an exemption from state taxes," a factor considered "critical" by the Tenth Circuit to *Colville*. *Richards*, 379 F.3d at 985. However, the sale price of the cigarettes sold in *Colville* was irrelevant to this Court's on- off-reservation value analysis. *Colville's* reference to the marketing of the tax exemption on cigarettes was used to illustrate only the lack of services provided by the Tribe to purchasers who immediately left the reservation after purchase, which relates to the second, not the first, prong of its balancing test. Had the cigarettes been sold at market price, the result would have been the same – nearly all value is off-reservation because few services were provided by the

Tribe.[11] Why the purchaser is on the reservation is not relevant to *Colville*.

The Tenth Circuit, by judicial fiat, divested motor fuel of all off-reservation value and conferred it on the reservation, intoning merely that the Court "must look beyond the physical motor fuel . . . and [] *view* the . . . motor fuel sales as an *integral* and *essential* part of the [Tribe's] on-reservation gaming enterprise." *Richards*, 379 F.3d at 984 (emphasis added). The Tenth Circuit provided no explanation or support in the record for why it believed it must adopt this particular "view" of product value, nor did it provide any support for its decision to "view" the motor fuel station as "integral and essential" to the casino. It "viewed" the motor fuel station and the casino as one and the same simply because it was expedient to the outcome it wished to achieve.

Colville focused on the reservation-added value of the product itself, not the reason the purchaser was there. "The Washington tax . . . concerns [only] transactions in personalty with no substantial connection to the reservation lands." *Colville*, 447 U.S. at 156. Likewise here, motor fuel has no substantial connection to reservation lands. The Tenth Circuit is simply wrong factually in "viewing" the motor fuel station as an "integral and essential part" of the casino. There is nothing in the record supporting this finding or demonstrating that the casino would be affected

[11] For example, if a convenience store were located on-reservation just off-highway, convenience might dictate the purchase of cigarettes or motor fuel there, but the purchaser would immediately leave. The Tenth Circuit would hold that because the buyer was attracted by the convenience of the reservation store, the cigarettes had only reservation value. *Colville* is, however, to the contrary.

adversely by even the total absence of the motor fuel station. The opposite is true. A round trip to the casino from any major urban centers in Kansas can be made on one tank of gas. There are motor fuel outlets in Mayetta, Kansas, at the juncture of the Tribal road to the casino and Highway 75, from which motor fuel could be purchased conveniently. There are motor fuel stations along the route from Kansas urban centers. Thus, the motor fuel and the station from which it is dispensed is unnecessary to the success of the casino.[12]

The Tenth Circuit relied heavily upon *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to support its supposition that the motor fuel station and casino are one. *Cabazon* is inapposite. It did not involve State taxation's indirect economic impact on the Tribe or on purchasers of a product the Tribe purchased off-reservation and sold on-reservation. Rather, it involved only the attempted State regulation of the Tribe's gambling activities at its high stakes bingo hall. There is no indication in that case that any product purchased off-reservation and

[12] Indeed, the only reason to purchase motor fuel on the reservation, rather than the city of origin of the casino patron, or in Mayetta, Hoyt, or Dennison, Kansas (all located conveniently close to the reservation), is the perpetual two cents below competition price at which it is marketed, made possible by an exemption from state taxation. Contrary to the Tenth Circuit's holding, it appears that the Tribe is marketing its exemption from State taxation by remaining two cents below the competition. Moreover, the Tribe is free at any time to sell below the so-called "market price" so that motor fuel purchasers are attracted to the reservation by the tax exemption. This would lead to the anomalous and ironic result that off-reservation value, destroyed and re-vested in the Tribe by selling at market price, is restored suddenly by dropping that price. This absurdity demonstrates the illogic of the Tenth Circuit analysis. Litigation would occur every time the Tribe lowered the price of its motor fuel.

sold on-reservation was involved. Indeed, *Cabazon* found critical that "the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians," as is the case here! *Cabazon*, 480 U.S. at 219 (emphasis added). The on-reservation value of the bingo hall and the gambling activities was unrelated to off-reservation product sales. Like the casino here, the bingo hall was the result of tribal construction, maintenance, operation, and upkeep and provided gambling-related on-premises amenities, which contributed to an "attractive facility," "well run games," and "increase[d] attendance." *Id.* at 219. The motor fuel station does none of these things for the casino, nor did the Tenth Circuit explain or support its conclusion that it did. Casino patrons would be there even if the motor fuel station were not nearby.

Important to *Cabazon* was that the bingo hall resembled a "resort complex, featuring hunting and fishing that the Mescalero Apache Tribe operates on its reservation through concerted and sustained management of reservation land and wildlife resources." *Id.* at 220. This was a reference to *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983), which held: "This case is far removed from . . . situations such as on reservation sales outlets which market to nonmembers goods not manufactured by the Tribe or its members, in which the tribal contribution is *de minimis*." The motor fuel station here bears no resemblance to the bingo hall in *Cabazon* or the hunting and fishing facilities in *Mescalero Apache*.

Thus, the existence of a facility invested with strong, or even exclusively, on-reservation value that attracts people to the reservation does not lend its on-reservation

value to a product purchased off-reservation for sale on the reservation.[13] All the motor fuel's value is off-reservation. Kansas provides all the essential governmental services required by the producers of that value, including Kansas' extensive system of roads and highways funded by the tax in question, while the Tribe provides none. Therefore, the balance of interests in this first *Colville* factor favors Kansas.

C. The Tenth Circuit Failed To Compare The Provision Of Governmental Services To The Purchasers Of Motor Fuel By The Tribe And By Kansas.

The Tenth Circuit ignored the second prong of *Colville*, and did not compare services provided purchasers of motor fuel by the Tribe and by the State. The Tenth Circuit only noted in passing that purchasers "spend extended amounts of time using the entertainment services offered [by the Tribe]." *Richards*, 379 U.S. at 985. The Tenth Circuit neither discussed the nature of these "entertainment services," the extent thereof, and the

[13] *Accord, Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995) (State tax on purchasers of off-reservation goods sold at shopping mall, Scottsdale Pavilions, constructed by Tribe on-reservation and leased to various off-reservation retailers); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (State privilege tax on sale of tickets and concessionary items imposed on non-Indian operators in connection with on-reservation sporting and cultural activities in venues constructed at substantial expense by and owned by the Tribe); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *certiorari denied*, 522 U.S. 1076 (1998) (State business transaction and privilege tax on sales of food and beverages by non-Indian operators of restaurant and hotel constructed and owned on-reservation by the Tribe).

relationship of the Tribal motor fuel profits thereto, nor addressed what services were provided by Kansas and the relation thereto of its tax.

To compound its error, the Tenth Circuit failed altogether to address the third and last prong of *Colville*, that is, balancing the governmental services provided to off-reservation producers of value with the governmental services provided to the purchasers of motor fuel by the Tribe and Kansas, respectively.

To be sure, the Tribe provides "entertainment services" to motor fuel purchasers while they are on the reservation. The Tribes' profits from motor fuel sales, however, are not used to fund these "entertainment services" but are used only for roads, principally the one mile of road connecting the casino to State Highway 75. The Tribe's "entertainment services" are funded by other sources, such as casino revenues, which are not taxed or regulated by Kansas.[14]

The Tenth Circuit ignored that motor fuel purchasers spend practically all their time living, working, and recreating off-reservation, where Kansas provides all the essential governmental services. The Kansas tax is utilized for construction and maintenance of roads that are extensive, providing the means of access to work, shops, and entertainment, and are the only means of access to

[14] This case does differ from *Colville* in one respect. In *Colville*, cigarette taxes on Indian Traders provided nearly all the Tribe's revenue for essential governmental services, and the Tribe derived no profit from cigarette sales. Here, the Tribal profits from its motor fuel sales remain, though some "tax" revenue is lost. The primary sources of revenue for governmental services remain. The economic impact on the Tribe here is miniscule compared with that in *Colville*.

the reservation casino.[15] Without these roads, there would no casino.

Thus, though the Tribe provides some undefined "entertainment services" for a few days a year, Kansas provides governmental services for the remainder thereof. *Colville's* second prong decidedly favors Kansas. Because both the first two *Colville* factors overwhelmingly favor Kansas, the last, and determinative factor, balancing the first two factors, which was not performed by the Tenth Circuit, leaves no doubt that Kansas' tax is not preempted and does not interfere with Tribal sovereignty.[16]

D. The Tenth Circuit Ignored That The Significant Geographic Component Of Sovereignty Favors Kansas.

"There is a significant geographical component to tribal sovereignty[, which is] . . . highly relevant to the

[15] Importantly, Kansas has represented that this tax also assists Kansas in providing maintenance of over 40 percent of reservation roads, excepting the connection from Highway 75 to the casino.

[16] Importantly, there exists no comprehensive federal legislation regulating Tribal sales of products produced and manufactured off-reservation, which leave no room for any additional State regulation, unlike that found critical in *Bracker*, 448 U.S. 136 (1980) (on-reservation timber management, cutting and sale); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980) (Indian Trader Statutes, though these were not determinative in *Colville*, which may have overruled implicitly *Central Machinery*); or *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (on-reservation construction of educational facilities and education of tribal members). Furthermore "a congressional intent to preempt state taxation [cannot] be found in the Indian Reorganization Act, . . . the Indian Financing Act of 1973, . . . or the Indian Self Determination and Education Assistance Act of 1975." *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 183 (1989).

preemption inquiry. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, n. 18 (1983) ("Tribal sovereignty contains a significant geographic component."). This explains why the extent of the State's governmental services provided to the off-reservation producers of the value of a product sold on-reservation and the extent of such services provided off-reservation to the on-reservation motor fuel purchasers are so important in the pre-emption analysis.

Kansas is taxing solely off-reservation economic activity, that is, the receipt of motor fuel. It does not tax on-reservation delivery, sale, or purchase of that fuel. Thus, the "geographic component of sovereignty" favors the State in whose jurisdiction the taxable event occurred and the taxable parties reside – Kansas. That this off-reservation taxable activity may affect the Tribe's wholesale purchase price for motor fuel is irrelevant. The Tenth Circuit ignored the geographic component of sovereignty, though Kansas argued it with vigor. The geographic component of sovereignty strongly favors Kansas.

E. There Is No Tradition Of Tribal Sovereignty Involved In Sales Of Motor Fuel Purchased Off-Reservation.

"The goal of any pre-emption analysis is to determine the Congressional plan." *Rice v. Rehner*, 463 U.S. 713, 718 (1983). Thus, determining "whether federal legislation has pre-empted state taxation . . . is primarily an exercise in examining congressional intent." *Cotton Petroleum*, 490 U.S. at 176. In so doing, this Court has "employed a preemption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them."

Rice, 463 U.S. at 718. *Accord*, *Cotton Petroleum*, 490 U.S. at 176. The "tradition of Indian sovereignty" is employed only "as a 'backdrop' against which the applicable treaties and federal statutes must be read. . . ." *Rice*, at 719. Thus, courts must determine whether "that tradition [of Indian sovereignty] has [historically] recognized a sovereign immunity in favor of the Indians in some respect." *Id.* When the court does "not find such a tradition . . . [its] preemption analysis may accord less weight to the 'backdrop' of tribal sovereignty." *Id.* at 720. Therefore, a court must "first determine the nature of the 'backdrop' of tribal sovereignty. . . ." *Id.* "In the area of [motor fuel retail sales]" there are "no congressional enactments demonstrating a firm federal policy of promoting tribal self sufficiency and economic development." *Id.* at 724. Therefore, the "backdrop" of Tribal sovereignty must be given less weight and State sovereignty more weight. The Tenth Circuit did the opposite through its tortured reasoning, giving Tribal sovereignty dispositive weight.

F. If Upheld, The Tenth Circuit's Ruling Will Lead To Unmanageable And Unpredictable State Taxation, Commercial Chaos, And Endless Litigation.

The Tenth Circuit held that any State tax impacting the cost of a product sold, regardless of the off- or on-reservation incidence of the tax, may be enjoined by an Indian Tribe, its lessees or licensees if: (1) the tax results in a higher price paid, or a higher price charged the ultimate purchaser; (2) the Tribe possesses some on-reservation attraction that induces non-tribal members to travel to the reservation; and (3) the Tribe provides some "entertainment services" to those non-tribal members

while they are on the reservation. This achieves absurd results.

The key for the Tenth Circuit is an on-reservation attraction that serves as an inducement to non-Indians to travel to a reservation.[17] When such an attraction exists, any off-reservation products sold on-reservation may not include in the price charged to the Tribe, or in the price charged by the Tribe to its purchasers, any State taxes.

The price of motor fuel includes some portion of all the taxes imposed on various aspects of its discovery, production, transportation, refinement, distribution, marketing, storage, and wholesale sale.[18] Thus, the imposition of all these taxes could be enjoined insofar as they impact the price charged to or by the Tribe. The Tenth Circuit's reasoning provides no basis to exclude taxes imposed by other States from Tribal injunction. Often, much of the economic activity that produces off-reservation value occurs in other States. Thus, the Tribe could proceed to enjoin Louisiana's severance tax, imposed on motor fuel that is purchased directly by the Tribe in Kansas, and to enjoin every other tax in multiple States that is imposed from exploratory drilling to arrival at the reservation. The administration of such a system is impossible.

[17] This attraction could be the physical features or the history of the reservation; entertainment, historical or cultural activities conducted or provided by the Tribe; hunting or fishing; or, as here, a gambling facility.

[18] Such taxes may include but are not limited to severance taxes, vehicle licensing taxes, commercial vehicle taxes, road/mile taxes, excise taxes, use taxes, sales taxes, gross receipts taxes, income taxes, and business privilege taxes.

Under such circumstances, the Tribe could sell, not just motor fuel, but all manner of goods, all free from all State taxes that involve addition of value to the products. The Tribes' profit margins would be phenomenal. These goods could be priced at below market, as the Tribal motor fuel is. This would lead to continuing litigation over whether the discount prices were the draw for persons coming to the reservation. Consumer research has demonstrated that consumers will shift the outlet they use to purchase motor fuel based on price differentials of one to two cents per gallon. Energy Analysts International, *The Convenience Store Industry vs. Hypermarkets: Strategies for Competition*, 15-1 (2002). At best, this will put the courts in the position of determining the primary motivations for consumer behavior even when price differentials seem to be small.[19] At worst, this will be a prescription for institutionalizing permanent, determinative price advantages for on-reservation retailers. This is a grim prospect for *amici*, many of whose members have been impacted seriously or whose businesses have been closed by the non-uniform, discriminatory method of taxation that exempts Tribes and allows them to sell products below market price.

This is particularly problematic today. Tribes near urban centers, like the Prairie Band of the Potawatomi, have benefited from extensive commercial development on reservation lands, including casinos. Funds derived from these ventures are utilized often to acquire additional

[19] For example, what if the attraction and the product price each accounts for 50 percent of the inducement? How could one determine the facts without extensive scientific surveying of patrons? This demonstrates the irrationality of the Tenth Circuit's holding.

lands, put those lands into trust, and then engage in further commercial activities there. These activities are generally free from State taxation, giving Tribes tremendous competitive advantages. Many Tribes are becoming formidable commercial enterprises, largely because of the federal protections afforded them. The result has been the shrinking of local tax bases for States and their political subdivisions and unfair, often ruinous, competition. The need for the federal government's paternalistic protection and its concept of dependent sovereignty has changed considerably over the last 20 years. Under such circumstances, it is difficult to disagree with Justice Stevens that "the doctrine of sovereign immunity is founded upon an anachronistic fiction." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (Stevens, J. concurring).

This Court should reverse the Tenth Circuit's decision, which demonstrates a highly paternalistic and unsupportable view of Tribal sovereignty at the expense of, and without any consideration of, the sovereignty of the States of this Federal Republic.

CONCLUSION

The Tenth Circuit's ruling should be reversed and the Kansas tax declared valid and enforceable.

Respectfully submitted,

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In The Supreme Court of the United States

STEPHEN RICHARDS, in his official capacity as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, ALASKA, CALIFORNIA, CONNECTICUT, IDAHO, MICHIGAN, MISSOURI, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, UTAH AND WYOMING *AS AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE DECISION OF THE TENTH CIRCUIT SIGNIFICANTLY DEVALUES THE TERRITORIAL COMPONENT OF LEGITIMATE PREEMPTION ANALYSIS	2
II. THE ABANDONMENT OF THE RULE OF PREEMPTION SET OUT IN *MESCALERO APACHE TRIBE* WOULD HAVE THE EFFECT OF SUBJECTING ANY STATE REGULATION APPLIED OFF RESERVATION TO THE *WHITE MOUNTAIN APACHE TRIBE* TEST	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Atkinson Training Company v. Shirley, 532 U.S. 645 (2001) 3

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 3

DeCoteau v. District County Court, 420 U.S. 425 (1975) 3

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 3

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 4, 5, 6, 9

Nevada v. Hicks, 533 U.S. 353 (2001) 5

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 1, 5

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 4

Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005) 6, 7, 8, 9

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Other References:

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TABLE OF AUTHORITIES – Continued

Page

Nat'l Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2004* 8

Nat'l Indian Gaming Comm'n, Tribal Gaming Revenues, www.nigc.gov/nigc/tribes/tribaldata2003/july2003revenuept3.jsp 8

INTEREST OF AMICUS CURIAE

Amici States pursue a modest goal: The preservation of the bright-line rule which protects state authority outside of Indian country except where it is expressly preempted by Congress. The maintenance of "bright-line" rules is of such great importance that eleven states, including some of those who have joined in the present brief, actually opposed their sister state in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), when the sister state sought to substitute a fuzzy "economic reality" test regarding certain jurisdictional matters in place of a bright-line "legal incidence" test. A bright-line rule avoids divisive litigation between the states and the tribes and promotes harmony among them. Moreover, the existing bright-line rule prevents the intrusion of federal courts into the day-to-day management of the states, consistent with this Court's, and the States' understanding of the Constitution.

SUMMARY OF ARGUMENT

This Court has consistently held that "absent express federal law to the contrary," an Indian or Indian tribe going beyond reservation boundaries is subject to non-discriminatory state law. This doctrinal approach is based on a sturdy foundation of fact and history: Tribes have no tradition of tribal sovereignty off reservation, and therefore there is no reason that the special, on reservation, balancing test should be applied off reservation. By ignoring this well established principle of law and by further ignoring the basis on which it was established, the Tenth Circuit committed serious error.

The decision below should be reversed not only because its potential effects on the ability of a state to tax off reservation events, but because the principle underlying the decision will be and indeed is already being applied to off reservation non-tax controversies. Under the Tenth Circuit approach, any state statute or regulation which is alleged to interfere, off reservation, with a tribal interest or ordinance may be reviewed under the nuanced test of *White Mountain Apache Tribe*. This allows the federal court, in the words of the Tenth Circuit, to balance the "normative values" at issue to determine the validity of any state statute or regulation when applied off reservation.

The decision below allows the federal courts the power to review the day-to-day sovereign actions of the states off reservation. Such an extension of power is unjustified and should be rejected by this Court.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT SIGNIFICANTLY DEVALUES THE TERRITORIAL COMPONENT OF LEGITIMATE PREEMPTION ANALYSIS.

This case concerns the question of when otherwise legitimate state laws are preempted off reservation by the operation of federal law for reasons relating to tribal sovereignty. Prior to the decision below, it has always been understood that different tests would apply on and off reservation. On reservation, a nuanced, and often difficult to apply, interest balancing test has been applicable. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145

(1980). *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176-77 (1989). Off reservation, however, this Court has consistently found that interest balancing did not apply, and that "'Indians going beyond reservation boundaries'" are subject to "'nondiscriminatory state law'" in the absence of "'express federal law to the contrary.'" *White Mountain Apache Tribe*, 488 U.S. at 144 n.11 (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

The rationale for the application of the differing tests is apparent: The interest balancing test was believed justified to accommodate the "tradition of Indian sovereignty over the reservation and tribal members." *White Mountain Apache Tribe*, 448 U.S. at 143. This has flowed from the Court's recognition that there is a "significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). For example, in *Atkinson Training Company v. Shirley*, 532 U.S. 645, 653 (2001), this Court found that an "Indian tribe's sovereign power to tax – whatever its derivation – reaches no further then tribal land." In *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), this Court illustrated the profound territorial nature of tribal sovereignty, finding that if the lands in question were within a "continuing 'reservation,' jurisdiction is in the tribe and the Federal Government" but if the lands were "not within a continuing reservation, jurisdiction is in the State," except for Indian allotments. The intensity of battles over disestablishment and diminishment itself affirms the recognition of tribal sovereignty as confined to reservations or "Indian country."

Off reservation, in contrast, there simply is no tradition of tribal sovereignty and this Court's preemption jurisprudence reflects that singularly important fact. In

Mescalero Apache Tribe, 411 U.S. at 146, the tribe operated a ski resort immediately adjacent to, but outside, the boundaries of its reservation. The question was raised whether federal law had preempted the state's right to "impose a tax on the gross receipts of the [off reservation] ski resort." *Id.* The Court found that federal law raised no such bar: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. The Court continued that the "principle is as relevant to a State's tax laws as it is to state criminal laws . . . and applies as much to tribal ski resorts as it does to fishing enterprises." 411 U.S. at 149.

The Court emphasized that there was no heightened scrutiny of off reservation transactions merely because an Indian tribe was involved and that normal preemption rules applied. The Court stated that if "'Congress intends to prevent the State . . . from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences.'" 411 U.S. at 156 (*quoting Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-607 (1943)).

Mescalero Apache Tribe precludes arguments such as those relied upon by the Tenth Circuit. The tribal ski resort was adjacent to the reservation and undoubtedly supplied income to the reservation. The diminishment of the income to the reservation by virtue of the state taxation was irrelevant to the analysis of the Court which required, as a prerequisite to preemption "express federal law to the contrary." 411 U.S. at 148. The Tenth Circuit analysis, which relies almost exclusively on a reduction of

income to the tribe as a result of the off reservation transaction to justify its implicit repudiation of *Mescalero Apache Tribe*, is thus misguided.

Mescalero Apache Tribe remains good law. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995); *White Mountain Apache Tribe*, 448 U.S. at 144 n.11. None of this Court's decisions, moreover, have undermined the doctrinal basis for an "express federal law" requirement for preemption off reservation as opposed to the application of a more nuanced test on reservation. There has been no undermining of the critical "territorial component" of tribal sovereignty which is argued to justify the more nuanced test on reservation but which cannot conceivably justify the application of such an analysis *off* reservation, where there is no "tradition of Indian sovereignty." *White Mountain Apache Tribe*, 448 U.S. at 143.

II. THE ABANDONMENT OF THE RULE OF PREEMPTION SET OUT IN *MESCALERO APACHE TRIBE* WOULD HAVE THE EFFECT OF SUBJECTING ANY STATE REGULATION APPLIED OFF RESERVATION TO THE *WHITE MOUNTAIN APACHE TRIBE* TEST.

The Tenth Circuit's decision should be rejected by this Court not only because of its adverse effect on the states' taxing powers, but also because of its potential adverse effect on the states' regulatory powers. *See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (recognizing applicability of *White Mountain Apache Tribe* rule in non-tax controversies on reservation). Indeed, the Tenth Circuit has already applied its approach repudiating the "express federal law" requirement of *Mescalero Apache*

Tribe to a non-tax matter. In *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005), the Tenth Circuit found a state law requiring the tribe and tribal members to have state motor vehicle registrations and titles off reservation to be preempted. *Wagnon*, which was written by the same circuit judge who wrote the case now before this Court, explicitly rejects the traditional reading of *Mescalero Apache Tribe* that "absent express federal law to the contrary," Indians and Indian tribes are subject to nondiscriminatory state law when beyond the bounds of the reservation.

Although *Wagnon* does not specifically rely on *Richards*, the opinion does provide some further explanation of the scope of the Tenth Circuit's abandonment of the rule of *Mescalero Apache Tribe*. According to *Wagnon*, the rule is *not* that Indians going beyond reservation boundaries are subject to nondiscriminatory state laws "absent express federal law to the contrary" (*Mescalero Apache Tribe*, 411 U.S. at 148-49); rather, it is that "when state interests are secondarily affected," there is no requirement of "express federal law" for preemption and the nuanced balancing test of *White Mountain Apache Tribe* applies. *Wagnon*, 402 F.3d at 1023.*

The potential impact of the Tenth Circuit's repudiation of the rule of *Mescalero Apache Tribe* requiring "express federal law" as a prerequisite to off reservation

* The Tenth Circuit's negation of the rule of *Mescalero Apache Tribe* regarding "Indians going beyond reservation boundaries" and the requirement of no "express federal law to the contrary" was deemed required by an earlier decision in this litigation. *See Prairie Band Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1255 (10th Cir. 2001), cited at *Wagnon*, 402 F.3d at 1020.

preemption is startling. Whenever a tribe can claim an interest in an off reservation transaction, even one between two non-Indians (as in the case now before this Court), or whenever a tribe enacts an ordinance which conflicts with state law off reservation, a federal court may be called upon to examine the state law, and assess and weigh the "normative values" asserted by the state and tribe, one against the other. *See Wagnon*, 402 F.3d at 1025.

Wagnon presents the most obvious example of the next step in federal court involvement in the day-to-day governance of the states. Under *Wagnon,* presumably, federal courts may find that *no* state can deny the validity of *any* vehicle registration system adopted by any of the nation's 300 plus reservations or, perhaps, by any of the nation's 500 plus tribes. The impact on the states' ability to trace stolen or lost vehicles would be gravely damaged by such a result. Similarly, a state would no doubt be subject to federal litigation were it to enforce its driver's licensing laws with regard to a truck driver licensed by a tribe, even if the system adopted by the tribe was, in the view of the state, wholly insufficient. A routine purchase of office supplies or equipment for a casino by a tribe off reservation would, under the Tenth Circuit approach, presumably subject the states to a federal court battle.

The continued expansion of tribal casinos and other off reservation tribal business endeavors ensures that, if this Court were to adopt the Tenth Circuit's rule, the consequences on state taxing and regulatory authority would be significant. It is a virtual certainty that tribes will dramatically increase their off reservation business activities in the not distant future. Tribal revenues from gaming leaped from

$9.8 billion in 1999 to $18.5 billion in 2004. *See* Nat'l Indian Gaming Comm'n, Tribal Gaming Revenues, www.nigc.gov/nigc/tribes/tribaldata2003/july2003revenuept3.jsp; Nat'l Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2004* at 2. Tribal entities will seek to use these burgeoning revenues in the most profitable locations, and in many cases those locations are off reservation.

Even now, tribes are operating and investing in substantial projects off reservation. *See, e.g., An Analysis of the Economic Impact of Gaming in 2004* at 17-18; Harvard University, John F. Kennedy School of Government, "Economic Development Corporation: Ho-Chunk, Inc.," www.innovations.harvard.edu/awards.html?id=6409. (Winnebago tribal corporation recognized, inter alia, for utilizing tribe's "various economic and legal advantages" and for off reservation business investments in "Oregon, Colorado, Minnesota, Utah, Kansas, Oklahoma, Wisconsin, Texas and New Jersey.") Under the Tenth Circuit approach, should a tribe build a hotel in the heart of New York City, each health or safety regulation attempted to be imposed upon it by the city would be subject to a *White Mountain Apache Tribe* balancing test. The city's jurisdiction would be preempted, according to the Tenth Circuit, if a court, "assessing normative values to varying interests and weighing one against the other" (*Wagnon*, 402 F.3d at 1025) found that the regulation was "incompatible with and outweighed by the strong tribal and federal interests." *Prairie Band Potawatomi Nation v. Richards*, Pet. App. at 7. The probability of decisions adverse to the city would be enhanced by the Tenth Circuit's focus on the strength of the *tribe's* interest in revenue (*Id.* at 12) and its disinclination to seriously consider the effects on state revenue. *Id.*

at 13-14. The tribe could presumably argue that the hypothetical off reservation hotel complex would not have been built but for the on reservation gaming revenues and that, in fact, the off reservation hotel complex funnels customers into the on reservation gaming casino.

The decisions of the Tenth Circuit unjustifiably place a substantial weapon in the hands of any tribe with which to combat any local, off reservation regulation which the tribe understands or argues to be an impediment to a more profitable operation. A tribe will always have a lawsuit available with regard to its off reservation activity should the Tenth Circuit be affirmed. There is, however, nothing in the Constitution which allows federal courts to so broadly and comprehensively adjudge the acceptability of off reservation statutes adopted by the states on the basis of the federal court's understanding of the supposed "normative values" underlying such statutes. 402 F.3d at 1023.

In sum, *Richards* and the Tenth Circuit negation of *Mescalero Apache Tribe* pose a serious, and in many ways unprecedented, attack on the ability of states to act as states beyond the supervision, day-to-day, by the federal courts.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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JOAN WAGNON,
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v.

PRAIRIE BAND POTAWATOMI
NATION,
Respondent

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Tenth
Circuit

AMICI CURIAE BRIEF OF HOOPA VALLEY TRIBE AND COLORADO RIVER INDIAN TRIBES ON BEHALF OF RESPONDENT PRAIRIE BAND POTAWATOMI NATION REGARDING VALUE GENERATED ON RESERVATION

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TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE "VALUE GENERATED ON RESERVATIONS" INQUIRY IS WELL-FOUNDED AND SHOULD NOT BE DISTURBED 3

II. "VALUE GENERATED ON RESERVATION" IS ESPECIALLY IMPORTANT IN THE CONTEXT OF NATURAL RESOURCES 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Agua Caliente Band of Cahuilla Indians v. Hardin,
223 F.3d 1041 (9th Cir. 2000).....4
Cabazon Band of Mission Indians v. County of Riverside,
783 F.2d 900 (9th Cir. 1986).....4
Cabazon Band of Mission Indians v. Wilson,
37 F.3d 430 (9th Cir. 1994).....5
California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987).....5
Central Machinery Co. v. Ariz. State Tax Comm'n,
448 U.S. 160 (1980).....4
Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977).....2, 8
Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989).....4
Crow Tribe of Indians v. Montana,
650 F.2d 1104 (9th Cir. 1981), *amended*
665 F.2d 1390 (1982).....6
Crow Tribe of Indians v. Montana,
819 F.2d 895 (9th Cir. 1987), *aff'd*
484 U.S. 997 (1988).....6
Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).....4, 5
Gila River Indian Community v. Waddell,
91 F.3d 1232 (9th Cir. 1996).....4
Hoopa Valley Tribe v. Nevins,
881 F.2d 657 (9th Cir. 1989), *cert. denied*,
494 U.S. 1055 (1990).....6, 7
Indian Country U.S.A. v. Okla. Tax Comm'n,
829 F.2d 967 (10th Cir. 1987).....4
Jicarilla Apache Tribe v. Supron Energy Corp.,
728 F.2d 1555 (10th Cir. 1984).....4

Kerr-McGee Corp. v. Navajo Tribe of Indians,
731 F.2d 597 (9th Cir. 1984).....4
Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982).....4
New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983).....4
Oklahoma Tax Comm'n v. Chickasaw Nation,
515 U.S. 450 (1995).....4
Queets Band of Indians v. Wash.,
765 F.2d 1399 (9th Cir. 1985).....4
Sac and Fox Nation of Missouri v. Pierce,
213 F.3d 566 (10th Cir. 2000).....4
Salt River Pima-Maricopa Indian Community v. Ariz.,
50 F.3d 734 (9th Cir. 1995).....4
Seneca-Cayuga Tribe of Okla. v. Okla.,
874 F.2d 709 (10th Cir. 1989).....4
Squaxin Island Tribe v. Wash.,
781 F.2d 715 (9th Cir. 1986).....4
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....3, 5
Yavapai-Prescott Indian Tribe v. Scott,
117 F.3d 1107 (9th Cir. 1997).....5

Statutes

25 U.S.C. § 1451.....8
25 U.S.C. § 2101.....8
25 U.S.C. § 3501.....8

Other Authorities

18 C.C.R. § 1616(d)(3)(A) (2005).....8
Cal. Adm. Code Pub. Rev. R. 1026 (1989).....6
Cal. Rev. & Tax Code § 38104 (1989).....6

Supreme Court Rule 37(3)(a).....1
Supreme Court Rule 37(6).....1
WAC § 458-20-192(7)(a)(i) (2005).....8
WAC § 458-20-192(7)(c).....9

The Hoopa Valley Tribe and the Colorado River Indian Tribes submit this *amici curiae* brief on behalf of the Respondent Prairie Band Potawatomi Nation seeking to affirm the decision of the United States Court of Appeals for the Tenth Circuit. This brief exclusively adds factual context for the concept of 'value generated on the reservations by activities in which the Tribes have a significant interest.' Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

The Hoopa Valley Tribe and the Colorado River Indian Tribes (collectively "Tribes") are federally recognized sovereign Indian tribes. Each tribe generates value in producing sand, rock and ready mix cement derived from natural resources on their respective reservations. Reservation lands are the source of gravel and similar minerals which the Tribes seek to refine and market as part of their efforts to create employment opportunities and build reservation economies.

The Colorado River and the Trinity and Klamath Rivers flow through the *amici* Tribes' reservations. The ancestral home of the Hoopa Valley Tribe, established as an Indian reservation in 1864, is located in northwestern California between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. The Reservation is remote, but has sizable stands of commercial timber. The Tribe and the federal government bear all timber management and harvest burdens.

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[1] In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

The Hoopa Valley Tribe has also financed, constructed and is operating a plant to build modular housing units, which it markets both on and near its reservation. The Colorado River Indian Reservation lies mostly in Arizona, but encompasses land on both sides of the Colorado River in Arizona and California. The Reservation was established in 1873 for the Mojave and Chemehuevi Indians of the lower Colorado River. The Tribes, county, state and federal government all fund various public services on the Reservations.

The Tribes urge the Court to affirm the importance of the "value generated on reservations" inquiry as a means to preempt unlawful state taxes as applied to Indian tribes. The Court should refrain from adopting the ill-conceived sweeping "bright-line" test requested by the Petitioner state of Kansas and its *amici*. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (rejecting "bright-line" legal incidence rule in favor of particularized balancing when judging validity of state tax under the Commerce Clause). The Court should continue to evaluate and protect strong tribal interests in shielding value generated on reservations from unlawful state exactions on a case-by-case basis, as was appropriately done in the decision below.

SUMMARY OF ARGUMENT

The "value generated on reservations" inquiry is a valid and important balancing test that has been applied and refined by the Courts of Appeals for the Ninth and Tenth Circuits over the past two decades. The doctrine of reservation generated value is central to a particularized injury approach to evaluating state taxes as applied to Indian tribes. In the instant case, the Tenth Circuit properly applied the facts within the framework of the "value generated on reservations" inquiry and held that

the state of Kansas' motor fuel tax as applied to Respondent Prairie Band Potawatomi Nation's fuel sales is unlawful.

Value generated on Indian reservations takes several forms and must be given proper weight in a particularized inquiry into the nature of the state, federal and tribal interests at stake in each case. The particularized "value generated on reservations" inquiry works, and worked as was intended in the court of appeals below.

ARGUMENT

I. THE "VALUE GENERATED ON RESERVATIONS" INQUIRY IS WELL-FOUNDED AND SHOULD NOT BE DISTURBED.

Principles concerning value generated on Indian reservations have been clearly delineated in case law since the inception of the doctrine in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980). In this path making decision, the Court explained the "value generated on reservations" inquiry as follows:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. [Citation omitted]. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities

> involving the Tribes and the taxpayer is the recipient of tribal services.

Id. In reliance on this doctrine, courts below, especially in the Ninth and Tenth Circuits, have elucidated appropriate factors that bring the Court's principles to life and provide a guiding framework for tribes and states to follow when addressing taxes implicating "activities involving the Tribes."[2]

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[2] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 233 (1989); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982); *Central Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 169 (1980); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000); *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 585 (10th Cir. 2000); *Gila River Indian Community v. Waddell (Gila River II)*, 91 F.3d 1232, 1236 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Community v. Ariz.*, 50 F.3d 734, 736 (9th Cir. 1995); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 713 (10th Cir. 1989); *Indian Country U.S.A. v. Okla. Tax Comm'n*, 829 F.2d 967, 986 (10th Cir. 1987); *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986); *Squaxin Island Tribe v. Wash.*, 781 F.2d 715, 720 (9th Cir. 1986); *Queets Band of Indians v. Wash.*, 765 F.2d 1399, 1408 (9th Cir. 1985); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 599 (9th Cir. 1984); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1571 (10th Cir. 1984).

The oft-applied balancing test neither favors tribes nor states. Rather, the specific facts appropriately determine whether the state tax stands or falls. For instance, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987), the Court invalidated a state regulation emphasizing that the tribes had built modern facilities, provided recreational opportunities and services, and giving weight to these important tribal interests. Likewise, in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994), the Court discerned a substantial tribal investment in the tribes' off-track wagering facility while noting that some value stemmed from horse races off-reservation. In contrast, in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), the Court concluded that the tribe contributed little to the value of the products and services sold at the hotel and failed to show that it had an active role in the creation of the value taxed.[3] As these cases aptly demonstrate, the particularized interests balancing test fairly addresses the weight accorded tribal interests where value is generated on reservations by activities in which Indian tribes have a significant interest. The inquiry is fair and reasonable, taking into account both the tribes and the states' interests.

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[3] *See also Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (The tax regulation "which falls on non-Indian purchasers of goods that are merely retailed on a reservation -- stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes,' *Colville*, 477 U.S., at 156-57.").

II. "VALUE GENERATED ON RESERVATION" IS ESPECIALLY IMPORTANT IN THE CONTEXT OF NATURAL RESOURCES.

The importance and continuing necessity of the balancing inquiry is highlighted in the context of natural resources. Natural resource value generated on reservations represents a cornerstone of economic development for numerous Indian tribes across the West, including the *amici* tribes. States should not be able to tax such value merely by arbitrarily placing the incidence of the tax on an off-reservation party. One illustration of the "value generated on reservations" inquiry regarding natural resources is *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990). *See also Crow Tribe of Indians v. Montana,* 650 F.2d 1104 (9th Cir. 1981) ("*Crow I*"), *amended* 665 F.2d 1390 (1982) (holding that because coal from the reservation and adjacent areas was a component of the land, the tribe was not marketing a tax exemption); *Crow Tribe of Indians v. Montana,* 819 F.2d 895, 899 (9th Cir. 1987) ("*Crow II*") (holding that state taxes imposed on a non-Indian lessee were preempted because the coal "lease brings revenue that represents value generated by tribal activities and in which the tribe has a substantial interest"), *aff'd* 484 U.S. 997 (1988).

In *Nevins*, the Hoopa Valley Tribe successfully challenged the California timber yield tax, a tax imposed on "the first non exempt person" to acquire legal or beneficial title to the timber. The State applied the tax to private companies who purchase tribal timber directly from the Bureau of Indian Affairs or from the tribal enterprise. Cal. Rev. & Tax Code § 38104 (1989); Cal. Adm. Code Pub. Rev. R. 1026 (1989). The yield tax is normally assessed at the time of harvest on the value of the timber. Both the district court and the court of appeals sided with the Tribe to preempt the state yield tax that

had, in 1976, replaced the state of California's *ad valorem* tax on timber.

In conducting the particularized inquiry into the nature of the state, federal and tribal interests at stake in the case, the court of appeals noted that "State taxes or regulations that interfere with tribal activities may be preempted if the tribal activity the state seeks to affect involves goods produced on the Reservation." *Nevins*, 881 F.2d at 659. Although the State's interest in imposing the tax on off-reservation lumber mills was considered in the court's particularized inquiry, that interest was judged insufficient to outweigh the strong federal and tribal interests at stake. *Id.* at 660-61 (finding that the state's "general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests with which the timber yield tax interferes").

One of the numerous benefits of the value generated on reservations inquiry is the test's ability to fairly consider and respond to myriad tax situations. Indian tribes are involved in generating value through natural resource extraction, manufacturing, financial services, software development, and entertainment. For instance, the *amici* tribes generate value by, *inter alia,* producing sand, rock and ready-mix cement on their reservations derived from the resources that their lands provide. Other Indian tribes create value through other goods and services; in the instant case of the Respondent Prairie Band Potawatomi Nation, through reservation fuel sales and related services.

The scope of the goods and services created and marketed on the reservation is as unique and varied as the tribes and the lands they call home. So too are the state taxes at play. There is no compelling reason to eschew judicial fact-finding in Indian tax cases such as this to achieve vague

notions of predictability. As this Court concluded in *Complete Auto*, a bright-line test that looks only to the legal incidence of a tax to adjudicate tax matters "has no relationship to economic realities. Rather, it stands only as a trap for the unwary draftsman." *Complete Auto*, 430 U.S. at 279. Practical effects of a tax are to be considered. *Id.* at 278. Legal incidence bright-line rules "serve[] only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause." *Id.* at 285. A particularized inquiry into the nature of the state, federal and tribal interests at stake in each case is necessary to fairly consider the unique attributes of economic development implicated and to preserve the preemptive effect of the Indian Commerce Clause and federal law.

Indeed, Title 25 of the United States Code contains a patchwork of statutes regulating tribal reservation physical resources and promoting enterprises to sustain these unique outposts of tribal culture and self-government. *See, e.g.*, 25 U.S.C. § 1451 (financing economic development), § 2101 (developing tribal mineral resources), § 3501 (Indian energy resources). If states are able to capture the market value generated on Indian reservations simply by shifting the incidence of taxation to a non-exempt person, then they will have frustrated the preemptive effect of federal law and the intent of Congress to promote tribal self-sufficiency through laws that promote and regulate commerce on Indian reservations.[4] No simplistic bright-line test based upon the

[4] The tax exempt nature of goods whose value is generated on reservations is recognized in some states and should not be disturbed. *E.g.*, California, 18 C.C.R. § 1616(d)(3)(A) (2005) (meals, food or beverages sold for consumption on the reservation); Washington, WAC § 458-20-192(7)(a)(i) (2005) (food, arts and crafts), § 458-20-192(7)(c) (describing appropriate balancing test for value generated on the reservation).

incidence of taxation can fairly accommodate the many federal, tribal and state interests that arise in tax cases.

CONCLUSION

This Court should affirm the judgment of the Tenth Circuit, and continue to evaluate and protect strong tribal interests in shielding value generated on reservations from unlawful state exactions.

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No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether the Kansas tax here – "imposed on the use, sale or delivery of all motor vehicle fuels" – is invalid as applied to fuel sold and delivered to a tribally owned gasoline station on an Indian reservation for sale at market prices when the state tax would nullify a comparable tribal fuel tax that is dedicated exclusively to improving reservation roads.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 2
A. Factual Background 2
B. District Court Proceedings 8
C. The Tenth Circuit's Decision 9
SUMMARY OF ARGUMENT 11
ARGUMENT 13
I. THE STATE TAX IS NOT IMPOSED ON OFF-RESERVATION ACTIVITY, NOR IS IT "NON-DISCRIMINATORY." 13
A. The State Tax Is Imposed On The Sale Or Delivery Of Fuel To The Reservation. 14
B. The State Tax Is Not "Non-discriminatory." 17
II. THE FRAMEWORK ESTABLISHED IN *BRACKER* GOVERNS THE ANALYSIS HERE. 20
A. The Established Indian Preemption Framework Is Tailored To The Unique Status Of Tribes. 21
B. The Court Should Reject The State's Proposed Categorical Limitation Of *Bracker*. 22

III. THE BALANCE OF TRIBAL, FEDERAL, AND STATE INTERESTS PRECLUDES THE STATE TAX HERE. 27
A. The Tribe's Sovereign Interests In Imposing Taxes To Maintain Infrastructure And Foster Economic Development Are Compelling. 28
B. There Is A Compelling Federal Interest Here. 35
C. The State's Interests Are Minimal. 42
IV. THE STATE TAX IMPERMISSIBLY INFRINGES THE TRIBE'S RIGHT TO SELF-GOVERNMENT. 45
V. THE STATE'S PROPOSAL TO OVERRULE *BRACKER* SHOULD BE REJECTED. 47
CONCLUSION 50

Appendix A

Statutory Provisions Involved 1a

Appendix B

Kansas forms MF-52, *available at* http://www.ksrevenue.org/pdf/forms/mf52.pdf 18a

Appendix C

Kansas forms MF-52A, *available at* http://www.ksrevenue.org/pdf/forms/gas52a.pdf 20a

TABLE OF AUTHORITIES

CASES

Arizona v. California, 373 U.S. 546 (1963).....23, 34

Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999).....47, 50

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).....5

Cabazon Band of Mission Indians v. Smith, 388 F.3d 691 (9th Cir. 2004).....18

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).....9, 32, 34

Carmell v. Texas, 529 U.S. 513 (2000).....46

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980).....11, 16, 22

Cherokee Nation of Oklahoma v. Leavitt, 125 S. Ct. 1172 (2005).....39

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).....21, 22

Commissioner v. Soliman, 506 U.S. 168 (1993).....49

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).....25, 26

Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983).....34

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).....22, 27, 28, 30, 31, 43, 44, 47

County of Yakima v. Confederated Tribe & Bands of Yakima Indian Nation, 502 U.S. 251 (1992).....26

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989).....18

Department of Taxation & Finance v. Milhelm Attea & Brothers, Inc., 512 U.S. 61 (1994).....16, 22, 31, 47, 48

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Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).....18, 24, 28

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).....26, 31

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).....21

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New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)..... 21, 22, 25, 27-30, 32, 42, 45, 48

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995).....17, 22, 23, 25, 27, 45, 47

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).....49

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993).....16, 26, 43

Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226 (1985).....21

Patterson v. McLean Credit Union, 491 U.S. 164 (1989).....48

Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (2005), *petition for cert. filed*, __U.S.L.W.__ (U.S. June 23, 2005) (No. 04-1740).....18, 19

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997).....41

Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977).....49

Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298 (1992).....50

Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).....22, 23, 27, 37, 40, 48, 49

Rice v. Rehner, 463 U.S. 713 (1983) 22, 29, 38, 46

Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000).....9, 17

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).....21, 48

In re Tax Exemption Application of Kaul, 933 P.2d 717 (Kan. 1997).....16

Thomas v. Gay, 169 U.S. 264 (1898).....33

United States v. Mazurie, 419 U.S. 544 (1975) 29

United States v. New Mexico, 455 U.S. 720 (1982).....50

United States v. State Tax Commission of Mississippi, 421 U.S. 599 (1975).....17

United States v. Winans, 198 U.S. 371 (1905).....23

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).....16

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)..... 10, 16, 22, 25, 29, 31-34, 46, 49

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).....24

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).....2, 12, 13, 20, 21, 22, 27, 28, 45, 48

Williams v. Lee, 358 U.S. 217 (1959).....46

Winters v. United States, 207 U.S. 564 (1908).....23

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 23

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. art. 1, § 8, cl. 3.....21

23 U.S.C. § 135(d)(2) 39

23 U.S.C. § 135(e)(2)(C) 39

23 U.S.C. § 135(f)(1)(B)(iii) 39
23 U.S.C. § 202(d)(2)(B) 38
23 U.S.C. § 202(d)(3) 38
23 U.S.C. § 202(d)(4) 38
23 U.S.C. § 204(a)(2) 38
25 U.S.C. §§ 261-264 16
25 U.S.C. § 318a 38
25 U.S.C. § 450a(b) 28
25 U.S.C. § 450f *et seq.* 28
25 U.S.C. §§ 461-479 28
25 U.S.C. § 1451 *et seq* 28
25 U.S.C. § 1451 28
25 U.S.C. §§ 2701-2721 4
25 U.S.C. § 2702(1) 41
25 U.S.C. § 2710(b)(2)(B)(i) 4
25 U.S.C. § 2710(b)(2)(B)(iii) 4
26 U.S.C. § 4081(a)(2)(A)(i) 5
26 U.S.C. § 4081(a)(2)(B) 5
The Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (1998) 38
Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 28
Kansas Act for Admission, 12 Stat. 127, § 1 (1861) 41
25 C.F.R. § 170.610 *et seq* 39
25 C.F.R. § 170.930 39

25 C.F.R. § 170.932(d) 35, 39
25 C.F.R. Part 170 38
K.S.A. § 22.2401a(3)(a) 4
K.S.A. § 79-3401 *et seq.* 5
K.S.A. § 79-3401(f)(4) 14
K.S.A. § 79-3402 5
K.S.A. § 79-3408 14
K.S.A. § 79-3408(a) 14
K.S.A. § 79-3408(c) 8, 15
K.S.A. § 79-3408(d) 15
K.S.A. § 79-3408(d)(1) 15, 17, 42
K.S.A. § 79-3408(d)(2) 15, 17
K.S.A. § 79-3408(d)(3) 15
K.S.A. § 79-3408(d)(5) 15
K.S.A. § 79-3408g(d)(2) 8
K.S.A. § 79-3409 ..... 8, 17
K.S.A. § 79-3417 14
K.S.A. § 79-3424 7
K.S.A. § 79-3425 20
K.S.A. § 79-4301, art. I(4) 7
K.S.A. § 79-34,142 ..... 6, 20
K.S.A. (U.C.C.) § 84-2-401(2) 15
N.M. Stat. § 7-13-4 35
PBP Code § 10-6-1 *et seq.* 5
PBP Code § 10-6-7 5

LEGISLATIVE MATERIALS

S. Rep. 106-406 (2000) 36, 37

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http://www.fhwa.dot.gov/ohim/hwytaxes/2001/kansas.htm 6

INTRODUCTION

The State's presentation rests on a pervasive series of mischaracterizations that seek to obscure what is ultimately at stake in this case. Respondent Prairie Band Potawatomi Nation (the "Tribe") does not contend, and the Tenth Circuit did not hold, that States are forbidden from enforcing non-discriminatory laws against Indians doing business outside of Indian country. Likewise, the Tribe does not contend, and the Tenth Circuit did not hold, that a non-discriminatory, off-reservation state tax of general applicability may be precluded simply because the tax has an adverse economic impact on a Tribe or its members.

Attacking these straw men, the State never comes to grips with the actual issue presented here – the permissibility of a state tax that effectively *nullifies* a Tribe's power to impose a comparable tax on fuel sold at market price by a tribally owned, on-reservation gas station (the "Nation Station" or "Station"). The facts relevant to that issue are undisputed. The Tribe retails gasoline at the Station on its reservation. The Station charges market prices and does not "market a tax exemption" by luring customers to the reservation with artificially low prices. Rather, the Station's non-Indian customers generally travel to the rural Kansas reservation to visit the tribal casino – the principal economic engine for a Tribe that lacks abundant natural resources. The Tribe has imposed a tax on fuel sold at the Station, and that tax is dedicated by tribal law *exclusively* to the construction and upkeep of reservation roads and bridges, many of which the State and the County have failed to keep in proper repair. Application of the state tax has the practical effect of nullifying the tribal tax and eliminating *all* of the Tribe's fuel tax revenue.

The state tax thus interferes directly with a core attribute of *tribal* sovereignty – the Tribe's power to impose a fuel tax to finance the construction and maintenance of reservation roads and bridges. The State's studied ignorance of the Tribe's sovereign interest in taxation to support its infrastructure is ironic at best, as the power to tax is the very attribute of its own sovereignty that the State purports to vindicate. Despite the State's contentions, this case is not about economic advantage, but about how to accommodate the competing interests of two legitimate sovereigns. The State's solution is to deny the Tribe's interest in its entirety.

As the Tenth Circuit correctly recognized, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*"), and other cases require a more nuanced analysis that accounts not only for the state interest, but also for the other interests at stake, including the Tribe's interest in funding reservation infrastructure – as other sovereigns do -- and the federal interest reflected in the comprehensive scheme governing reservation roads. Applying that analysis compels the conclusion that, with respect to fuel delivered to the Station, the state fuel tax cannot stand.

STATEMENT OF THE CASE

Eager to obscure what is at issue in this case, the State devotes less than a page to the "Material Facts." Kan. Br. 3-4. That is understandable, because a full consideration of the relevant facts – which, as the Tenth Circuit noted, the State did not contest, *see, e.g.*, JA133-34, 139-40, 142 – casts this case in an entirely different light.

A. Factual Background

1. Respondent Prairie Band Potawatomi Nation is a federally recognized Indian Tribe that was evicted from its

ancestral home in the Great Lakes region and eventually resettled in present-day Kansas. *See Tiller's Guide to Indian Country* 554 (Veronica E. Velarde Tiller ed., 2005 ed.).

Two treaties in the 1860s carved up the Tribe's Kansas reservation, and the Dawes Act of 1887 "all but decimated the tribal land base." *Id.* Through the early part of the 20th century, the Tribe "subsisted on farming, hunting and trapping, wage labor, and leasing of their lands," and the Tribe "suffered greatly through the Great Depression and the accompanying drought of the 1930s." *Id.* As recently as a decade ago, "economic opportunities on the reservation . . . remained rather limited." Tiller, *supra*, at 345 (1st ed. 1996).

2. The Tribe today resides on a 121-square-mile reservation in Jackson County, a remote county in northeast Kansas that has a population of roughly 13,000 people. The reservation contains some 212 miles of roads. Ownership and responsibility for maintaining those roads is allocated among the State, Jackson County, and the Tribe, which operates a Road and Bridge Department of 32 employees, 31 of whom are tribal members. As a result of the failure of the State and County to provide "proper road maintenance" on their roads found within the reservation, the Tribe has assumed responsibility for an increasing share of such maintenance. Ramirez Aff. ¶ 2 (JA79). The number of road miles for which the Tribe is responsible increased from 63 miles in 1996 to 118 miles in 2000 (55% of total reservation roads), including miles of state and county roads that the Tribe does not own. *Id.* The Tribe receives no state or county funding for this purpose.

The reservation lacks abundant natural resources or other obvious means of generating economic activity and drawing visitors and businesses to the reservation. To develop a

substantial on-reservation economy, the Tribe invested more than $35 million to construct a casino complex, which includes restaurants, a gift shop, and a hundred-room hotel. The Tribe owns and operates the casino pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and uses the casino revenues principally to fund tribal government programs and promote tribal economic development, as IGRA requires. *See id.* § 2710(b)(2)(B)(i), (iii).

The casino allows the Tribe to provide a range of government services on the reservation to members and non-members alike. The tribal police department is "a full service law enforcement agency" whose officers not only enforce tribal law but also act as certified Kansas law enforcement officers. Tiller, *supra*, at 555; K.S.A. § 22-2401a(3)(a). The Tribe operates an active court system with general jurisdiction to hear civil and criminal matters, *see* Tiller, *supra*, at 555, as well as a Department of Motor Vehicles. The Tribe also provides an extensive network of social services, including a new health clinic to serve the reservation, *id.*, an alcohol and drug center, a vocational rehabilitation program, and a food distribution network. *See generally* JA70-74. In addition, the Tribe devotes more than 43% of all gaming revenues to economic development and improving reservation infrastructure. Tiller, *supra*, at 555.

In 1999, the Tribe spent $1.5 million to build a state-of-the-art, full-service gas station and convenience store – including $250,000 for fuel handling facilities, JA41, 66 – on United States trust land near the casino, principally to serve the influx of casino patrons. JA37. The Tribe owns and operates the Station, providing all of its financing, accounting, and management. Roughly half of the Station's employees are tribal members. The Station purchases fuel

wholesale from Davies Oil Company, a non-Indian distributor with offices off-reservation, which delivers the fuel directly to the Station.

3. Three separate sovereigns claim the right to impose fuel taxes in connection with fuel sold at the Station. The federal government imposes a tax of 18.4 cents per gallon on the "removal, entry, or sale" of all motor fuel. *See* 26 U.S.C. § 4081(a)(2)(A)(i); *id.* § 4081(a)(2)(B). Revenues from the federal fuel tax – more than $24 billion nationwide in 2004 – constitute the bulk of the Federal Highway Trust Fund, which funds state, federal, and tribal road construction.

The Tribe also imposes a tax on sales of fuel at the Station. PBP Code § 10-6-1 *et seq.* (Resp. App. 15a). The tribal tax, which is imposed on retailers, was 16 cents per gallon when this litigation began, and has been 20 cents per gallon since January 2003. JA134. Pursuant to tribal law, the Tribe uses these tax revenues exclusively to construct and maintain roads, bridges, and rights-of-way located on or near the reservation. PBP Code § 10-6-7 (Resp. App. 16a). There are three gas stations on the reservation, but two are owned by non-members on fee lands and are considered untaxable by the Tribe under *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). The Station is thus the sole source of the Tribe's fuel tax revenue of approximately $300,000 annually.

The State of Kansas similarly has a fuel tax, *see* K.S.A. § 79-3401 *et seq.* (Resp. App. 1a), to fund construction and maintenance of public roads in Kansas. *Id.* § 79-3402. The state fuel tax generates substantial revenues – over $331 million in 1999 and $429 million in 2004. By law, the State is committed to pay a portion of the funds – roughly 40% – to counties and cities within the State for road and street

construction and maintenance. *See* K.S.A. § 79-34,142; <http://www.fhwa.dot.gov/ohim/hwytaxes/2001/kansas.htm >. In contrast, the State shares no fuel tax revenues with the Tribe, even though the State collects all of the tax revenues from the two non-tribally-owned stations on the reservation.

4. The record below contains an expert report (the "Pflaum Report") and numerous affidavits submitted by the Tribe that describe the Station's operation and the impact of the state and tribal tax schemes. None of this evidence was disputed by the State.

Unlike the tribal businesses in many previous cases to reach this Court, the Tribe's Station "sells fuel at fair market prices," JA133-34 – it "is not 'marketing a tax exemption,'" JA134 (quoting Pflaum Report); *see also id.* (noting that "the price of fuel at the . . . Station is . . . within 2¢ per gallon of the price prevailing in the local market"); JA39-40 (Pflaum Rep. § 4.02); JA86 (Moulden Aff. ¶ 2); JA69-70 (Boursaw Aff. ¶ 2.A). As the Tenth Circuit noted, the State "has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices." JA134.[1]

The Station "does not seek nor does it compete for fuel purchases from those who would not otherwise be on the reservation." JA34 (Pflaum Report § 3.2). The Station is located on the casino access road approximately two miles from the nearest highway. It is not visible from the highway,

[1] Despite this concession, the State exaggerates the difference between the state and tribal taxes by comparing the state tax today (24 cents per gallon) with the tribal tax at the time suit was filed (16 cents per gallon). *See* Kan Br. at 3-4. The tribal tax is now, and was when this suit was filed, within 4 cents per gallon of the state tax. Regardless, the critical point is that it is uncontested that the Station sells fuel at "market prices."

and it is poorly situated to market gasoline to highway travelers. JA37 (Pflaum Report § 4.01). Instead, the Station generates customers as a result of its proximity to the casino. As the Tenth Circuit noted, the Tribe "submitted expert testimony, which the [State] does not dispute, that 'the "value marketed" by . . . [the] Station results from the business generated by the casino and from employees of the casino and [the Tribe's] government and residents.'" JA133 (quoting Pflaum Report). Indeed, 73% of the customers of the Station are casino patrons and employees, and another 11% otherwise live or work on the reservation. JA37, 91.

5. In 1992, the State entered into an agreement with the Tribe governing a range of "excise taxes," including fuel taxes. *See* JA20-26. The State and the Tribe agreed that "it is to their mutual benefit to cooperate in matters relating to taxation," and that the state legislature desired to "eliminate problems which result from tribal and state taxation and regulation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on the reservations and those off reservations." JA20-21. To effectuate these policies, the 1992 Agreement broadly exempted from state excise taxes all tribal sales on the reservation to non-Indian purchasers as long as the Tribe imposed its own tax of "not less than sixty percent" of the state tax. JA22. The agreement had a five-year term and was renewable by mutual consent of the parties. JA24.

The 1992 Agreement reflected the State's policy of respecting the sovereignty of other governments and avoiding "double taxation" of fuel. *See, e.g.*, K.S.A. § 79-3424; *id.* § 79-4301, art. I(4); JA18-19. In accordance with this policy, the state tax was not imposed on tribally taxed fuel delivered to Indian reservations in Kansas – just as it was not imposed on fuel destined out of State.

In 1995, the State abruptly changed its policy. The state legislature amended the fuel tax statute to eliminate the tribal exemption. *See Kaul v. Kansas Dep't of Revenue*, 970 P.2d 60, 65-67 (Kan. 1998) (describing the "long history of amendments"). Although the State retained the existing exemption for the sale or delivery of fuel to the United States, it provided that "this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel . . . is to a retail dealer located on an Indian reservation in the state." K.S.A. § 79-3408g(d)(2); *see also Kaul*, 970 P.2d at 65 (describing provision). Then, in 1997, the State declined to renew the 1992 Agreement – over the Tribe's objection – eliminating the final state-imposed bar to taxing tribal fuel.

6. It is undisputed that enforcing the state tax on fuel sold and delivered to the Station would effectively nullify the tribal fuel tax. Although a provision of the statute purports to place the legal incidence of the state tax on the distributor as the taxpayer, *see* K.S.A. § 79-3408(c); *but see infra* p.17 n.5, it also provides that distributors "shall be entitled" to pass the tax on to fuel retailers, *id.* § 79-3409; *see also Kaul*, 970 P.2d at 67 ("The legislature intended that distributors . . . include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers."). Because of the highly elastic demand curve in the market for fuel, the resulting double taxation would be fatal to the Station. *See* JA142. As the Nation's expert explained, "'the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Station's] fuel business to virtually zero.'" *Id.* (quoting Pflaum Report).

B. The District Court Proceedings

The Tribe brought suit in federal district court, seeking to enjoin the State from collecting its fuel tax on fuel delivered

to the Station. The Tribe argued principally that federal law preempted the state tax and that the tax infringed upon the Tribe's right to self-government.

The district court granted summary judgment to the State. JA90. The court analyzed the tax under both "federal preemption and tribal rights to self-government," JA111 (citing *Bracker*), but concluded that neither doctrine precluded the state tax.

C. The Tenth Circuit's Decision

The Tenth Circuit reversed. Applying *Bracker*, the court of appeals held that the Kansas tax "interferes with and is incompatible with strong tribal and federal interests against taxation." JA144.

The court of appeals concluded first that "the [Tribe]'s fuel revenues [are] derived primarily from value generated on its reservation." JA139. Central to the court's conclusion was that "the [Tribe] sells its fuel at fair market prices," and thus, "in stark contrast to the smokeshops in *Colville*, the [Tribe] is not marketing an exemption from state taxes." *Id.*; *see also* JA138-39 (noting that "the [Tribe's] fuel market does not exist because of a claimed state tax exemption"); JA138 (distinguishing *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 583-85 (10th Cir. 2000)).

As the court of appeals explained, by building the casino, the Tribe "created a new fuel market for an otherwise remote area," and then financed and built the Station – at the cost of over a million dollars – to service that market. JA140; *see* JA139. The Tribe's situation is thus like that in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), because its casino patrons "spend extended amounts of time using the entertainment services offered by the [Tribe]," and

are not lured to the reservation by low prices. JA131. The Tenth Circuit concluded that the Tribe's interests in avoiding the tax are "particularly strong" because the tax revenues are "'derived from value generated on the reservation by activities involving the Tribes.'" JA137 (quoting *Washington v. Confederated Tribes of Colville Indian Reservations*, 447 U.S. 134, 156-57 (1980) ("*Colville*")).

The Tenth Circuit also recognized the important tribal sovereignty interests at stake, most prominently the Tribe's need to "raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure" and to do so "without state assistance." JA141. These interests were critical because the Tribe "has financial responsibility for the majority of the roads and bridges on and near its reservation" – including (but not limited to) the access road to the casino – and because "[f]uel revenue is typically used to pay for a government's infrastructure expenses." *Id.* The court of appeals emphasized that it is not "economically feasible" for both the Nation and the State to impose taxes with respect to the Station's fuel, and application of the state tax would nullify the Tribe's effort to generate fuel tax revenue to fund these critical government services. *Id.*

The Tenth Circuit determined that the Tribe's interests in this regard were directly aligned with the "strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal government," as reflected in numerous federal statutes, as well as in Executive Branch orders and decisions of this Court. JA142-43. In contrast, the Tenth Circuit viewed the State's interest as minimal because the tribal tax revenue "is derived primarily from value generated on the reservation." JA143. Accordingly, the court of appeals held the Kansas tax invalid "as it applies to the Nation's fuel." JA144.

SUMMARY OF ARGUMENT

The state tax here would nullify tribal efforts to fund critical reservation infrastructure through a tribal tax on fuel sold at market price by a tribally owned station on the reservation. The State's principal argument is that the validity of the state tax must be assessed not under the framework established in *Bracker*, but instead under a categorical rule that a "non-discriminatory" state tax imposed on the "receipt of fuel off the reservation" is permissible absent express congressional preemption.

The State's effort to avoid *Bracker* postulates a tax that does not exist: a non-discriminatory tax imposed on the off-reservation receipt of fuel. As the text and structure of the state statute make clear, the tax is imposed not on the off-reservation receipt of fuel, but on its *on-reservation sale and delivery*. Thus, *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), squarely controls this case and precludes application of the state tax.

Nor is the tax non-discriminatory. The State has chosen to exempt fuel deliveries to other sovereigns, yet the State refuses to extend a similar exemption to Tribes. A tax that expressly discriminates against Tribes is invalid.

The State's effort to avoid *Bracker* is meritless in any event. The State suggests that *Bracker* does not apply because the reservation border acts as "a barrier to the reach of the tribe's interest." Kan. Br. at 16. But the Court has squarely rejected the argument that a state tax is categorically permissible because it is imposed on a non-Indian off-reservation, and cases dating back more than a century confirm the common-sense notion that off-reservation state regulation can impermissibly infringe a Tribe's sovereign interests. The State's contrary position

cannot be reconciled with the foundations on which *Bracker* rests – the Indian Commerce Clause and notions of inherent tribal sovereignty demand a more nuanced analysis.

That the State strains to avoid application of *Bracker* and its progeny is unsurprising, because a faithful application of that precedent condemns the Kansas fuel tax. The Tribe's power to impose a tax on fuel sold at market prices to fund critical infrastructure projects is a fundamental aspect of self-government that the state tax would effectively nullify – even though it is the precise analogue of the interest the State so vigorously presses on its own behalf. Moreover, the Station's customers are drawn by the on-reservation value generated by the Tribe's operation of its casino complex, which offers a wide range of services. The Tribe's interests are thus at their strongest.

A similarly strong federal interest favors preemption, reflected principally in the network of "congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development" in the context of reservation roads. *Bracker*, 448 U.S. at 143. Federal law expressly endorses the use of a "Tribal fuel tax" to improve roads that are, as the Bureau of Indian Affairs has put it, "among the most rudimentary of any transportation network in the United States." *See infra* p.36. The State's fuel tax frustrates the substantial interests in tribal economic development and sovereignty that Congress has sought to promote with respect to tribal roads.

The State's interests are correspondingly weak. The tax revenues at issue – roughly $300,000 annually – are less than one-tenth of one percent of the total state fuel tax revenues, and thus preemption would have only a negligible effect on the State's asserted interest. Nor can the State justify its tax

– which would give the State *all* of the tax revenue generated on the reservation – on the basis of maintenance that the County and State provide for some reservation roads. The State provides no services at all on tribally owned reservation roads, and it is precisely the inadequacy of county and state services on the roads they own that make the Tribe's need for fuel tax revenues so compelling.

The state tax is also precluded by the "independent but related" prong of *Bracker* that prevents the State from "unlawfully infring[ing] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). The State's principal response – that this argument is waived – is meritless. The Tribe squarely raised the argument below, as both the district court and court of appeals expressly acknowledged. JA115-20, 135.

The State is thus left to contend that *Bracker* should be abandoned. But that would require this Court to overturn more than 30 years of precedent without any sound justification for doing so. The state tax cannot stand.

ARGUMENT

I. THE STATE TAX IS NOT IMPOSED ON OFF-RESERVATION ACTIVITY, NOR IS IT "NON-DISCRIMINATORY."

The State and its *amici* spend page after page advocating that the settled approach set forth in *Bracker* and its progeny be replaced with a "'categorical' rule," Kan. Br. 16, that "absent express preemption, a state is free to apply its non-discriminatory, off-reservation laws (even against Indians)," *id.* at 17. As we will show, the State's proposed rule is inconsistent with this Court's precedents and contrary to the

well-established Indian law concepts those precedents reflect. *See infra* Part II. But the State's argument also fails at the most fundamental level because it is premised on a mischaracterization of the state tax, which is neither "imposed on off-reservation activity" nor "non-discriminatory."

A. The State Tax Is Imposed On The Sale Or Delivery Of Fuel To The Reservation.

The major premise of the State's argument is that the state tax "is *imposed* on the *off-reservation receipt* of motor fuel by the distributor." Kan. Br. 10 (emphasis added); *see also id.* at 3, 6, 13, 34. But that is incorrect. By its plain terms, the Kansas statute provides that the tax is "*imposed* on *the use, sale or delivery* of all motor vehicle fuels . . . which are used, sold, or delivered in this state for any purpose whatsoever." K.S.A. § 79-3408(a) (emphasis added). The title of the provision confirms that the taxable event is use, sale, or delivery in the State – and not the distributor's mere receipt of fuel. *See id.* § 79-3408 (entitled "Tax imposed on use, sale or delivery of motor-vehicle fuels . . . .").

Other related provisions reinforce that the Kansas tax is imposed on the distributor's use, sale, or delivery of the fuel rather than on the mere receipt of fuel by, or the sale of fuel to, the distributor. For example, a distributor is entitled to a tax refund for all fuel "lost or destroyed" (*e.g.*, by fire, leakage, or theft) while the distributor still owns the fuel. *Id.* § 79-3417. Were this a tax merely on receipt, such loss or destruction would be irrelevant to the distributor's tax burden. Moreover, the statutory definition of the taxable "distributor" is one who has "received *and* . . . uses, sells, or delivers . . . fuels in the State of Kansas." *Id.* § 79-3401(f)(4) (emphasis added). Thus, the distributor's mere

receipt is not the taxable activity, but instead precedes the subsequent taxable "use, sale, or delivery."

Under the plain terms of the statute, the distributor's receipt of fuel is only the first step in determining a distributor's tax obligation. *See id.* § 79-3408(c) (noting how state tax is initially "computed"); Kansas Form MF-52 (Resp. App. 18a-19a) (monthly form filed by distributor), *available at* <http://www.ksrevenue.org/pdf/forms/mf52.pdf>. The Kansas statute exempts from the tax numerous "transactions," *id.* § 79-3408(d), including the "*sale or delivery* . . . for export from the state of Kansas to any other state or territory or to any foreign country"; the "*sale or delivery* . . . to the United States"; the "*sale or delivery* of motor-vehicle fuel . . . to a contractor for use in performing work for the United States"; and the "*sale or delivery* of motor-vehicle fuel" to another distributor, *id.* § 79-3408(d)(1), (2), (3), (5) (emphasis added). The ultimate tax liability, therefore, depends on whether, where, and to whom the fuel is ultimately sold or delivered.

The purported imposition of the legal incidence of the tax on the "distributor of the first receipt" does not change the analysis. Kan. Br. 6, 13 (citing K.S.A. § 79-3408(c)). This preliminary incidence inquiry determines the identity of the taxpayer – not the nature of the taxable event, or whether that event occurs "on-" or "off-" reservation. For the Station, the relevant sale and delivery occur on-reservation.[2]

This Court has repeatedly recognized that a State may not escape preemption through clever recharacterization of

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[2] Title to the fuel passes when it is delivered to the Station. *See* K.S.A. (U.C.C.) § 84-2-401(2) ("Unless otherwise explicitly agreed[,] title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.").

its tax. *See, e.g.*, *Colville*, 447 U.S. at 163 (rejecting state effort relabel a personal property tax an "excise tax"); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 126-28 (1993) ("Oklahoma may not avoid our precedent by avoiding the name 'personal property tax' here any more than Washington could in *Colville*."); *cf. Nelson v. Sears & Roebuck Co.*, 312 U.S. 359, 363 (1941) (focusing, under Interstate Commerce Clause, on a tax law's "practical operation, not its definition or the precise form of descriptive words which may be applied to it") (internal quotation marks omitted). Kansas's repeated assertions that the tax is "off-reservation" thus do not make it so.[3]

Because the state tax is imposed on the sale or delivery of fuel to the reservation, it is squarely foreclosed by *Central Machinery*, 448 U.S. 160. *Central Machinery* involved the application of a state "transaction privilege tax" to the sale of tractors to a tribal enterprise by a non-Indian vendor that did not have a place of business on the reservation. There, as here, the state tax was imposed on the sale of merchandise delivered to the reservation; the legal incidence of the tax fell on the non-Indian seller; and the tax was added directly to the purchase price paid by the tribal business. *See* 448 U.S. at 161-62. Relying on *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Court held the tax preempted by the Indian trader statutes, 25 U.S.C. §§ 261-264; *see also Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (upholding minimal burdens on off-reservation Indian traders but distinguishing "a tax imposed directly" on those traders).

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[3] Kansas tax statutes must be read to protect the rights of the Tribes, *Kaul*, 970 P.2d at 65, and are construed strictly against the State, *In re Tax Exemption Application of Kaul*, 933 P.2d 717, 725 (Kan. 1997).

The Court thus rejected the State's attempt to defend its tax as falling upon the off-reservation seller of goods and not the on-reservation sale, holding that, "regardless of the label placed upon this tax, its imposition as to on-reservation sales" was preempted. 448 U.S. at 164 n.3. The State's effort to "re-label" its tax here must meet the same fate.[4] This case thus presents no occasion to consider the State's contention that state taxes imposed on off-reservation activity are categorically lawful absent express preemption.[5]

B. The State Tax Is Not "Non-discriminatory."

The State also errs in describing the tax as "non-discriminatory." *See, e.g.*, Kan. Br. 6, 7, 17, 21. While taxing fuel delivered to the Tribe, the Kansas scheme exempts from taxation fuel sold or delivered to *all other sovereigns*. *See* K.S.A. § 79-3408(d)(1)-(2) (exempting fuel

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[4] In its reply brief at the certiorari stage, the State attempted to distinguish *Central Machinery* on the ground that, here, "the State tax is imposed on an activity that occurs entirely off-reservation prior to any subsequent delivery." Petr. Cert. Reply at 5. As noted, that does not accurately describe the Kansas tax.

[5] Notwithstanding K.S.A. § 79-3408(c), these same provisions call into question the Tenth Circuit's holding in *Sac & Fox*, 213 F.3d at 578-80, that the legal incidence of the state tax falls on the distributor. This Court has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 607 (1975). Here, the Kansas Legislature authorized the distributor to "charge and collect" the tax "as a part of the selling price" to the retailer, K.S.A. § 79-3409, and the state Supreme Court found that "[t]he legislature intended that distributors . . . include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers at the time the distributors deliver motor fuel to the retailers." *Kaul*, 970 P.2d at 67. The fairest reading of the statute is that the legal incidence of the tax actually falls on the Tribe, and thus cannot survive. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

sold to the United States, as well as fuel for "export from the state of Kansas to any other state or territory or to any foreign country"). A statute that grants exemptions to similarly situated sovereigns while withholding them from the Tribe is discriminatory on its face. *See First Fed. Sav. & Loan Ass'n of Boston v. State Tax Comm'n*, 437 U.S. 255, 257-58 (1978) (applying "similarly situated" test to determine whether state tax is discriminatory); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 816 (1989) (describing relevant inquiry as whether inconsistent tax treatment is "directly related to, and justified by, significant differences between the two classes") (internal quotation marks omitted).

Judge McConnell's analysis in *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. June 23, 2005) (04-1740) ("*Wagnon*"), is instructive. In *Wagnon*, the Tenth Circuit addressed a Kansas statute that recognized vehicle registration and titling by other sovereigns, but refused to accept vehicle registration and titling by Kansas Tribes. Judge McConnell's concurrence applied *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and concluded that the grant of exemptions to other sovereigns while withholding those same exemptions from the similarly situated Tribe was "a form of discrimination" that rendered the tax invalid. *Id.* at 1030-31 (McConnell, J., concurring). Judge McConnell rejected Kansas' proffered "safety rationale" for its policy, noting that Kansas recognized vehicles registered and tagged in other States "without reference to any safety standards." *Id.* at 1031; *see also Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 700-02 (9th Cir. 2004) (stating that, although "'[t]ribal reservations are not States,'" the relevant comparison for discrimination purposes is between the

particular state and tribal governmental functions involved (quoting *Bracker*, 448 U.S. at 143)).

That same analysis requires the conclusion that the Kansas tax here is discriminatory, because it treats similarly situated governments differently without justification. Critically, the State cannot justify the statutory distinctions by arguing that the State provides services to the Tribe and its distributor that it does not provide to other sovereigns and their distributors. That argument is foreclosed by the decision in *Kaul*, which construed these exemptions as existing "because the sellers of motor fuel under the jurisdiction of foreign governments are taxed by their respective governments to maintain the roads within that jurisdiction." *Kaul*, 970 P.2d at 63. Particularly in light of the Kansas courts' interpretation of the statute, there are no significant differences that would justify refusing the Tribe an exemption that other sovereigns receive. *See Wagnon*, 402 F.3d at 1030 (McConnell, J, concurring); *see generally* S. Rep. No. 97-646, at 11, *reprinted in* 1982 U.S.C.C.A.N. 4580, 4589 (noting that "with the power to tax, the power of eminent domain, and police powers, many Indian tribal governments have responsibilities and needs quite similar to those of state and local governments").

In any event, a distinction between the Tribe and other sovereigns based on the services that Kansas provides would be meritless. To be sure, the Tribe's fuel distributor uses state roads to deliver fuel to the Tribe, but the distributor does the same when delivering tax-exempt fuel out of State or to the United States. Similarly, tribal members make ample use of Kansas's off-reservation roads, but so do out-of-state drivers and the federal government. And while the State provides road services on the reservation, it already collects fuel taxes from the two non-tribal stations on the

reservation, while doing nothing to service the majority of reservation roads, which are maintained by the Tribe. *See infra* pp. 43-45.

The discrimination here is especially stark because the State deliberately singled out in-state Tribes for specific and adverse treatment. *See supra* p.8 (describing 1995 amendment that expressly eliminated exemption for in-state Tribes while preserving exemptions for other sovereigns). That adverse treatment is particularly troubling because Kansas dedicates a significant percentage (more than 40% in 1999) of the revenue generated by the state tax to a special city and county highway fund, but provides no such revenue to the Tribe, even though the Tribe has sole responsibility for the majority of reservation roads. K.S.A. § 79-3425; *see also id.* § 79-34,142 (prescribing allocation formula). The Tribe thus receives neither a state exemption so that it can impose its own taxes, nor a share of in-state fuel tax revenues.

Because the Kansas tax is discriminatory, it cannot survive. This case thus presents no occasion to consider the State's efforts to avoid, eviscerate, or eliminate *Bracker*. *See* Cert. Opp. at 13 n.5.

II. THE FRAMEWORK ESTABLISHED IN *BRACKER* GOVERNS THE ANALYSIS HERE.

Regardless of whether the state tax is imposed on the off-reservation receipt of fuel or is non-discriminatory, *Bracker* provides the proper analytic framework. *Bracker* recognizes two "independent but related barriers" to state regulation. 148 U.S. at 142. State regulation may be "preempted by federal law," *id.*, or it may unlawfully infringe a Tribe's right to "'make [its] own laws and be ruled by them,'" *id.* (quoting *Williams*, 358 U.S. at 220); *see* Part IV, *infra*.

A. The Established Indian Preemption Framework Is Tailored To The Unique Status Of Tribes.

Under *Bracker*'s preemption inquiry, state jurisdiction is preempted by federal law "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("*Mescalero II*").

This inquiry, which reflects the Court's synthesis of nearly two centuries of precedent seeking to reconcile state and tribal sovereignty, *Bracker*, 448 U.S. at 141-42, derives from two primary sources of law. *See* NCAI Amicus Br. Part I.A. *First*, the Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, has "divested [the States] of virtually all authority over Indian commerce and Indian Tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."); *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). Thus, the Court's modern Indian preemption standard derives in part from Congress' "broad power to regulate tribal affairs under the Indian Commerce clause." *Bracker*, 448 U.S. at 142.

Second, Indian preemption doctrine is based upon "traditional notions of Indian self-government," which are "deeply engrained in our jurisprudence." *Bracker*, 448 U.S. at 143. Indeed, the Court has long recognized that an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v.*

Georgia, 30 U.S. (5 Pet.) 1, 16 (1831), which retains the "right of self-government" free from state interference, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554-57 (1832). Although the Court has resisted an absolutist implementation of these principles, it has consistently reaffirmed aspects of the Tribes' retained sovereignty – chief among these the power of taxation, *see Colville*, 447 U.S. at 153; *Rice v. Rehner*, 463 U.S. 713, 722 (1983). Supplementing the force of the Indian Commerce Clause, the modern preemption doctrine also rests on the principle that "a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *Mescalero II*, 462 U.S. at 332-33 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-72 (1973)).

The Court's distillation of these principles requires a preliminary analysis of "who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). If the legal incidence "rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. But where "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax," and the "Indian preemption" analysis requires weighing "the balance of federal, state, and tribal interests." *Id.*; *see Bracker*, 448 U.S. at 145-46; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982).

B. The Court Should Reject The State's Proposed Categorical Limitation Of *Bracker*.

The State contends that this Court has embraced a "'categorical' rule" that would sidestep this balancing

analysis when the incidence of the tax is imposed on a non-Indian for an off-reservation transaction. Kan. Br. at 16. Even if the tax here were imposed on the non-Indian distributor off-reservation, this Court's cases reflect no such categorical rule. *See* NCAI Amicus Br. Part I.B.

Far from endorsing the State's approach, the Court has repeatedly *rejected* arguments that the *Bracker* analysis does not apply when the State puts the incidence of the tax on a non-Indian off the reservation. *See, e.g., Chickasaw*, 515 U.S. at 459 (contemplating the application of Indian preemption where the legal incidence of a state tax is placed on the off-reservation "wholesalers who sell to the Tribe"); *Ramah*, 458 U.S. at 844 n.8 (rejecting "'legal incidence' test, under which legal incidence and not the actual burden of the tax would control the preemption inquiry"). Similarly, the Court has applied *Bracker* where a state tax imposes obligations on non-Indian businesses, *see, e.g., Milhelm Attea*, 512 U.S. at 73-74 (applying balancing test to evaluate obligations imposed on off-reservation wholesalers), and it has invalidated a tax on the "gross receipts" of an off-reservation business for products delivered to a Tribe on the reservation, *see Central Machinery*, 448 U.S. at 161-62.

Indeed, at least a century of precedent endorses the common-sense notion that off-reservation state regulation can impermissibly infringe tribal sovereign interests. In *Winters v. United States*, 207 U.S. 564 (1908), for example, the United States successfully sued to prevent the building of off-reservation dams and reservoirs that would have limited water flows to the reservation. *Id.* at 576; *see also Arizona v. California*, 373 U.S. 546, 598-601 (1963). The same principle is reflected in the fishing cases. In *United States v. Winans*, 198 U.S. 371, 379 (1905), for example, the Court enjoined the use of a "fishing wheel" on private property off

the reservation when that wheel unduly restricted the ability of the Tribe to fish at its "usual and accustomed places." And in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that neither the Tribe nor the State could "rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share" of the fish. *Id.* at 682; *see also id.* at 679-85 (discussing cases).

The State seeks to ground its novel categorical rule in the statement in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." But *Jones* does not support the State's position here.

Jones involved state taxation of Indians who ventured off the reservation to build a ski resort, and thus the state tax was directed entirely at off-reservation activities of the Tribe and its members. The Court in *Jones* had no occasion to consider a context – such as the one presented here – in which an ostensibly off-reservation state tax effectively nullifies an important aspect of tribal sovereignty, such as a Tribe's ability to impose an on-reservation tax of its own to fund critical reservation infrastructure.[6]

There is therefore no basis for the State's contention that "this Court has determined that a tribe's reservation border acts as a barrier to the reach of a tribe's interest." Kan. Br. at 16. To the contrary, immunizing all off-reservation state action is incompatible with tribal self-government, as it would give the State the power to decide unilaterally when

[6] Indeed, here it is the *State* that is venturing *onto the reservation* to tax the sale and delivery of fuel to the Tribe. *See supra* Part I.A.

the Tribe can impose fuel taxes for critical infrastructure projects, even when the Tribe is not marketing a tax exemption. This Court has repeatedly rejected an approach that would allow Tribes to exercise sovereign authority "only at the sufferance of the State." *Mescalero II*, 462 U.S. at 338.

The Indian Commerce Clause similarly compels rejection of the State's contention. *See, e.g.*, *Colville*, 447 U.S. at 157 (acknowledging the Clause's "role to play in preventing undue discrimination against, or burdens on, Indian commerce"). The contours of the constitutional protection are determined by the extent of the burden on Indian commerce and the importance of the interests at stake, not by the manner in which state law imposes the burden. Yet, under the State's approach, federal and tribal interests weigh in the analysis when the taxed transaction is on-reservation, but become *entirely irrelevant* when the State simply moves the tax upstream without changing the material effect of the tax at all.[7]

The State's position here is thus reminiscent of one the Court rejected in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), where the Court held that merely shifting a tax "upstream" did not insulate it under the Interstate Commerce Clause. The state court had concluded that the Montana severance tax there at issue was valid *per se* because the state tax was "levied on goods prior to their entry into interstate commerce." 453 U.S. at 614. The Court

[7] The Court did state in *Chickasaw* that the State could "shift the tax's legal incidence." 515 U.S. at 460. But the shift in incidence there would have *triggered* – not foreclosed – the balancing test. *Id.* at 459. Nor can the State draw comfort from any suggestion in *Chickasaw* that the state tax would have survived the balancing test. The Tribe in *Chickasaw* was marketing a tax exemption, which *Colville* condemns. Here, the Tribe sells fuel at market price and generates on-reservation value.

rejected that rule, holding that "State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of the Commerce Clause inquiry." *Id.* at 616.

The State's categorical rule also would allow the State to circumvent settled precedent. This Court has held, for example, that sales to tribal members on the reservation are exempt from state taxation. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976). The State's approach would allow it to eliminate that tribal-member exemption simply by moving the incidence of the tax upstream. This Court's precedents cannot be so easily evaded. *See Sac and Fox*, 508 U.S. at 127 ("While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited.") (quoting *Colville*, 447 U.S. at 163); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (rejecting State's argument lest "otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe*)").

Finally, there is a far better way to handle these recurrent situations than establishing an inflexible legal rule that always favors States. *See generally* NITA Amicus Br. Over the past decades, numerous States including Oklahoma, Michigan, New Mexico, Montana, Arizona, Utah, and Nebraska have – like Kansas in 1992 – entered into agreements or enacted statutes that give Tribes a share of fuel taxes generated by sales on the reservation, providing tribal governments with millions of dollars for tribal roads.

See id. Under Kansas's categorical rule, States would have little incentive to make such agreements.

Disputes between States and Tribes, like disputes between States, are best resolved sovereign-to-sovereign in a manner that recognizes the governmental interests on both sides of the table. Federal law should provide background rules that favor context-sensitive accommodations between States and the Tribes – to whom the federal government owes trust responsibilities – rather than the one-sided "State takes all" categorical rule that Kansas desires here. *See id.*

III. THE BALANCE OF TRIBAL, FEDERAL, AND STATE INTERESTS PRECLUDES THE STATE TAX HERE.

Faithful application of this Court's precedents requires preemption of the state tax. Under those precedents, the Court must weigh "the balance of federal, state, and tribal interests." *Chickasaw*, 515 U.S. at 458; *accord Cotton*, 490 U.S. at 176; *Ramah*, 458 U.S. at 838. Notably, this analysis does not depend on "standards of pre-emption that have developed in other areas of the law." *Cotton*, 490 U.S. at 176. Express preemption is *not* required, *id.* at 176-77; *Mescalero II*, 462 U.S. at 333-34; the Court instead employs "a flexible pre-emption analysis sensitive to the particular facts and legislation involved," *Cotton*, 490 U.S. at 176.

Although this inquiry does not depend on "mechanical or absolute conceptions of state or tribal sovereignty," *Bracker*, 448 U.S. at 145, "the history of tribal sovereignty" provides a "necessary 'backdrop'" to the analysis, *Cotton*, 490 U.S. at 176, requiring treaties and federal statutes to be interpreted "generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 144.

Reinforcing this "history of tribal sovereignty" are "numerous federal statutes" that demonstrate the commitment of Congress and the Tribes to "promoting tribal self-government," *Mescalero II*, 462 U.S. at 334-35, and reflect "Congress' overriding goal of encouraging tribal self-sufficiency and economic development," *id.* at 335.

The Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, for example, was enacted "to provide a mechanism for the tribe as a governmental unit to interact with and adapt to a modern society," Felix S. Cohen, *Handbook of Federal Indian Law* 147 (1982 ed.), and to spur tribal economic development, *see Jones*, 411 U.S. at 152. Numerous other statutes – including the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450f *et seq.*, the Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, § 201 *et seq.*, 96 Stat. 2605, and the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* – similarly reflect the congressional commitment to tribal sovereignty, self-government, and economic development.[8] *See Bracker*, 448 U.S. at 143 n.10.[9]

A. The Tribe's Sovereign Interests In Imposing Taxes To Maintain Infrastructure And Foster Economic Development Are Compelling.

Ignoring this backdrop of tribal sovereignty, the State's brief treats tribal governments as little more than managers

[8] *See also* 25 U.S.C. § 1451 (declaring "policy of Congress" to enable Indians to "exercise responsibility for the utilization and management of their own resources"); 25 U.S.C. § 450a(b) (declaring commitment to the "development of strong tribal governments"); JA142-43.

[9] The Tribe invokes these provisions not as an independent basis for preemption, *cf. Cotton*, 490 U.S. at 183 n.14, but rather to reinforce and provide a backdrop for more specific federal enactments.

of private clubs, empowered to determine "tribe membership" but little else of substance. Kan. Br. 13-14. That crabbed view of tribal government has no basis in this Court's precedent and renders the State's cursory discussion of the tribal interests patently inadequate. *See, e.g.*, *Mescalero II*, 462 U.S. at 334-35 (recognizing that "Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Tribes in Indian country are "a good deal more than 'private voluntary organizations'")

"Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation," *Colville*, 447 U.S. at 153 (internal quotation marks omitted), which the tribes retain "unless divested of it by federal law or necessary implication of their dependent status," *id.* at 152; *accord Rice*, 463 U.S. at 722. That power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management," enabling "a tribal government to raise revenues for its essential services." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Mescalero II*, 462 U.S. at 335-36 (same). It also includes the power to tax commerce with non-Indians on the reservation. *See Colville*, 447 U.S. at 152; *Merrion*, 455 U.S. at 137.

These basic precepts of tribal power – which the State entirely ignores – cast the State's discussion of *its* interests in taxing fuel in a completely different light. *See* Kan. Br. at 10-13. Just as the power to tax is a claimed interest of the State as sovereign, so is the taxing power "a fundamental attribute of sovereignty which the tribes retain unless divested of it." *Colville*, 447 U.S. at 152. Just as fuel tax revenues enable a State (and the federal government) to build

and maintain essential infrastructure, so too is the Tribe's fuel tax "a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137. And just as an "extensive, well-maintained road and bridge system is vital to the State's economy," Kan. Br. at 12, so is such infrastructure a necessary precondition for the economic development of Indian Tribes. Indeed, inasmuch as "it is impossible to imagine that a state government could continue to exist without the power to tax," *id.*, so too is it for Tribes.

This case is thus not, as the State claims, simply about the State's power to tax and maintain its infrastructure. Nor is this case simply about what the State disparagingly describes as "Respondent's economic viability (*i.e.*, its profits)." Kan. Br. 28; *see also id.* at 5, 7, 8, 19. Rather, this case is about the need to reconcile and accommodate the recognized powers and interests of *two* sovereigns in imposing fuel taxes to raise revenue to build and maintain vital infrastructure. The State's proffered solution offers no accommodation at all: it effectively *nullifies* the Tribe's power to impose such a tax. *See supra* p.8.

When the State's tax or regulation would effectively nullify a Tribe's exercise of its sovereign power, the tribal interests are at their strongest. For example, in *Mescalero II*, the Court held that the authority of the Tribe there to regulate hunting and fishing by members and non-members on the reservation preempted conflicting state regulations because "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation." *Mescalero II*, 462 U.S. at 338. In *Cotton Petroleum*, the Court further underscored that complete displacement of a Tribe's power to tax – as here – is a compelling factor favoring the Tribe. There, the Court permitted a state severance tax on certain on-reservation oil and gas

production, but did so only because "no economic burden falls on the tribe by virtue of the state taxes," as "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development." *Cotton*, 490 U.S. at 185 (internal quotation marks and citation omitted).[10]

Furthermore, the Station sells its fuel at fair market prices and does not market an exemption from state fuel taxes to attract customers, *see* JA134, a fact that sharply distinguishes the sales here from those at issue in cases such as *Colville*, 447 U.S. at 155, *Moe*, 425 U.S. at 482, and *Milhelm Attea*, 512 U.S. at 64-65. It is undisputed that the "Station is a very different value proposition." JA41. The Station's customers come to the reservation because they are drawn to the on-reservation value generated by the Tribe's operation of a modern casino complex, which offers a wide array of related services in addition to gaming. The Tribe's interest is at its "strongest" where, as here, it attempts to capture the value it generates on the reservation. *Colville*, 447 U.S. at 156-57.

The additional evidence of significant tribal interest and involvement in the on-reservation value here is compelling. The Nation financed and constructed a $35 million casino and hotel, thereby generating a substantial flow of motor vehicle traffic in an otherwise remote location. To provide conveniences for employees and customers who travel on to the reservation, the Tribe financed and constructed the Station, a state-of-the-art, full service convenience store and

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[10] The State seeks to give *Cotton* controlling weight, *see* Kan. Br. 37-39, but completely ignores *Cotton*'s emphasis on the absence of tribal burdens. 490 U.S. at 185, 191. Because there were no significant tribal economic burdens at issue in *Cotton* – let alone the direct infringement of tribal sovereignty at issue here – the balance of interests in *Cotton* was altogether different.

gas station, at a cost of more than $1.5 million, including fuel handling systems that cost $250,000. The Tribe owns and operates and receives all revenues from both the casino and the Station, and many of the employees of the casino and the Station are tribal members. *Colville*, 447 U.S. at 156-57.

The tribal interest is further strengthened by the fact that the fuel distributor, the Station, and the Station's customers are all "recipient[s] of tribal services." *Id.* at 157. They benefit from the Tribe's construction and maintenance of roads on and near the reservation, JA79-81, 85 – including the main access road to the casino and the state highway intersection, JA67, 81. More generally, the distributor, the Station, and its customers benefit from a broad array of other tribal government services on the reservation. JA70-74.

This case is thus like *Cabazon* in which the Court found "on-reservation value" in an on-reservation gaming complex because – as here – the Tribe had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." *Cabazon*, 480 U.S. at 219. It is also like *Mescalero II*, in which the Court concluded that the State's hunting and fishing regulations were preempted where the Tribe had created "on-reservation value" by constructing a "resort complex" and developing the reservation's wildlife and land resources, thereby "generat[ing] funds for essential tribal services and provid[ing] employment for members who reside on the reservation." 462 U.S. at 341.[11]

[11] The Tenth Circuit did not hold, and the Tribe does not contend, that on-reservation value "automatically warrants preemption." *Cf.* Kan. Br. 36-37. It is one factor – albeit an important one – in the balance.

The State argues that *Thomas v. Gay*, 169 U.S. 264 (1898), somehow forecloses consideration of the on-reservation value generated here. Kan. Br. 34. But in *Thomas* – which upheld a state property tax imposed on cattle owned by non-Indian lessees of tribal land – the Tribe was not involved in generating the on-reservation value, as it neither owned the cattle nor participated in the grazing operations. Rather, *Thomas* involved only the Tribe's claim that it had a right to market an exemption from state taxes. *See Colville*, 447 U.S. at 183 (Rehnquist, then-J., concurring) (noting that in *Thomas* the "tribe complained that . . . lessees would be unwilling to pay the same price for tax-exempt grazing lands as for taxable grazing lands"). Moreover, *Thomas* did not involve competing tribal and state taxes, but only concerned the state's power to tax. *Thomas* thus did not present (as here) a "direct conflict between the state and tribal schemes." *Colville*, 447 U.S. at 158.[12]

The State next seeks to recast "on-reservation value" as limited to tribal activities concerning "natural resource[s] especially connected to [the Tribe's] land." Kan. Br. at 34, 36. But *Colville* forecloses such a limited meaning of "on-reservation value." Rather, *Colville* recognized that "on-reservation value" would result from "sales that, if credit [for the tribal tax] were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the [product]." *Colville*, 447 U.S. at 158. Here, the Tribe is generating "on-reservation value" under *Colville* because consumers are willing to venture onto the reservation to purchase fuel at

[12] The State's reliance on *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), is also misplaced. That case only held that the mere expenditure of income from non-Indian property for charitable Indian work was insufficient to exempt the property from state taxation.

market prices. It is precisely the "location" of the business, the "efforts of the Tribes in importing and marketing the product," *id.*, and the Tribe's substantial efforts to create a resort complex that draw casino patrons to the Station.[13]

For the same reason, *Colville* forecloses the notion that "on-reservation value" must arise from a tribal manufacturing process and cannot involve the resale of goods, even as part of a larger integrated economic enterprise such as the casino complex. Such a limited notion of on-reservation value threatens to restrict tribal economic value to making "Indian products," such as baskets and jewelry, and selling timber and coal. It is thus contrary to federal self-determination policy, as well as settled notions of "reservation value" in cases such as Indian law, *see, e.g.*, *Cabazon*, and in other areas of this Court's jurisprudence, *see Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 178-79 (1983) (noting that "value" can result from a "substantial mutual interdependence" among related businesses having "functional integration, centralization of management, and economies of scale"); *see also* Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* 39-43 (1985) (discussing a broad range of value generating activities beyond manufacturing). There is no basis to "dismiss the contribution of retailing to the product value proposition." JA41.

Finally, Kansas contends that any focus on "marketing an exemption" risks a "slippery slope," and raises the specter that Tribes will impose a "nominal tax" and sell goods at a

[13] Limiting value to natural resources is particularly perverse here. *Cf. Ariz. v. Calif.*, 373 U.S. at 598 ("It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation.").

deep discount on the reservation. Kan. Br. 30, 35 (citing *Colville*, 447 U.S. at 155). That argument is inapt here, where the State did not contest that the fuel is sold at market prices. Moreover, the State can fully address these concerns by providing a credit for any tribal tax imposed or by enacting a state tax that applies only to the extent that the Tribe fails to impose an equivalent tribal tax. Either option ensures that the total (tribal and state) tax burden is the same for all stations in the State. That basic approach is reflected in the 1992 Agreement, as well as in agreements or statutes of other States, *see, e.g.*, N.M. Stat. § 7-13-4, and accommodates the interests of *both* sovereigns.[14]

B. There Is A Compelling Federal Interest Here.

A comprehensive federal scheme governing reservation roads reinforces the Tribe's compelling interest in exercising its taxing power to fund improvements in those roads. In that scheme, Congress expressly chose tribal sovereignty as a mechanism for improving reservation roads that are in a state of disrepair. Critically, the tribal sovereignty at the core of the federal program is tied *directly* to the exercise of tribal taxing authority at issue here – federal regulations recognize the importance of "funding sources" other than federal funds to improve and maintain tribal roads, and specifically identify a "Tribal fuel tax" as an appropriate source of funds to implement the federal program. 25 C.F.R. § 170.932(d). By nullifying the exercise of taxing power endorsed in the federal scheme – the very power traditionally used by sovereigns to fund critical infrastructure – the state tax stands as an obstacle to the purposes of the federal scheme.

[14] Moreover, this case involves not just a tax on goods, but a fuel tax, which has been the traditional means by which sovereigns fund roads, and which implicates a comprehensive federal scheme. *See infra* __.

1. The Indian Reservation Road ("IRR") system is a collection of more than 63,700 miles of road, 25,700 miles of which are owned by the BIA or the Tribes, and 38,000 miles of which are owned by State, County, or other entities. More than 2 billion vehicle miles are traveled on the IRR system annually. *See* Bureau of Indian Affairs, Dep't of the Interior, *TEA-21 Reauthorization Resource Paper, Transportation Serving Native American Lands* at 2 (May 2003) ("BIA Report").[15] That system, however, is in a state of disrepair. The federal government has described the IRR system as "among the most rudimentary of any transportation network in the United States," with "some roads resembl[ing] roads in developing nations." *Id.* at 10. The vast majority of reservation roads are unpaved, and "many miles of these roads are impassable immediately after rainstorms." *Id.* at 15. More than 70% of the reservation roads are classified by the BIA as being in "poor" condition. *Id.* at 16; *see also* S. Rep. No. 106-406 at 2 (2000) ("S. Rep.") (noting the "enormous and largely unmet need for transportation infrastructure on Indian lands"). *See* ITA Amicus Br. 5-9.

These disastrous road conditions affect virtually every facet of tribal life. Fatality rates on reservation roads are more than four times the national average. BIA Report at 16. Road conditions "[s]low transport to emergency health services," "[d]ela[y] fire suppression response," and cause "[a]ccidents and injuries to tribal members and others." *Id.* at 13. The provision of basic federal services is often impossible, as road conditions preclude operation of BIA-run school buses and, and on some reservations, have even

[15] Available at <http://198.104.130.237/ncai/advocacy/cd/docs/transportation-bia_tea21_reauthorization .pdf>.

caused the U.S. Postal Service to cease reservation deliveries. *See* ITA Amicus Br. 9.

The poor road conditions also impede tribal efforts to generate substantial and sustainable on-reservation economies. Improving tribal economies is the highest priority for tribal governments, BIA Report at 8, as well as a longstanding federal priority, and a functioning road system is a *sine qua non* of economic success. Poor roads result in higher costs of goods and services on Indian lands and create substantial barriers to commercial investment. *Id.* at 13. Sustained economic development – including "[a]ccess to . . . economic sites, tribal housing, and service facilities" – "*require[s] a viable IRR system.*" *Id.* at 8 (emphasis added); *see also* S. Rep. at 3 ("Poor transportation infrastructure has a devastating impact on Indian emergency services, law enforcement capabilities, and economic development.").[16]

2. To address this crisis in reservation roads, the federal government has established the very sort of "comprehensive and pervasive" framework, *Ramah*, 458 U.S. at 839, that this Court has previously found important in its preemption analysis. The federal framework both promotes the construction, improvement, and maintenance of reservation roads and encourages Tribes themselves to assume increasing responsibility for those tasks. The centerpiece of the federal involvement is the Indian Reservation Roads Program ("IRR Program"), which seeks to ameliorate the condition and chronic under-funding of reservation roads. The IRR Program's twin goals are to improve tribal infrastructure and promote tribal sovereignty and economic

[16] The Tribe's reservation exhibits these same problems, as most of the roads on the reservation remain unpaved and suffer from "lack of proper road maintenance." JA79, 81, 85.

development. *See* 69 Fed. Reg. 43090 (2004); *see* ITA Amicus Br. 10-17.

The Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998), is the latest manifestation of the federal commitment to the IRR Program. In TEA-21, Congress authorized $1.6 billion in federal funding for the IRR Program for fiscal years 1998-2003, *id.* § 1101(a)(8)(A), and it directed the Secretary of the Interior to issue regulations governing the IRR program, 23 U.S.C. § 202(d)(2)(B). In particular, Congress required the Secretary to develop "transportation planning procedures" for reservation roads and bridges, *id.* § 204(a)(2), and to establish a "nationwide priority program for improving deficient Indian reservation roads and bridges." *Id.* § 202(d)(4)(A). Congress further authorized Interior Department appropriations for the "survey, improvement, construction, and maintenance of Indian reservation road bridges" that do not otherwise receive federal funds. 25 U.S.C. § 318a. Consistent with these directives, the Secretary of the Interior has adopted comprehensive IRR regulations. *See* 25 C.F.R. Part 170; *see also* 69 Fed. Reg. 43090-141.

3. Promoting tribal sovereignty and self-sufficiency are central to the IRR Program, and, indeed, to federal Indian policy more broadly. *See Rice*, 463 U.S. at 724 (the federal interest is strongest when it reflects "'a firm federal policy of promoting tribal self-sufficiency and economic development'" (quoting *Bracker*, 448 U.S. at 143)); *see also supra* p.38 (describing federal commitment to fostering tribal economic development and self-government).

Significantly for present purposes, the tribal sovereignty at the core of the IRR Program is tied directly to the tribal

taxing authority at issue here. The IRR regulations recognize the importance of "additional funding sources" to improve and maintain tribal roads, and they specifically identify, as one potential avenue for funds, a "*Tribal fuel tax*." 25 C.F.R. § 170.932(d) (emphasis added).

Indeed, the IRR Program leaves little doubt that strengthening tribal sovereignty is critical to its success. The regulations recognize, for example, that "Tribal governments, as sovereign nations, have inherent authority to establish their own transportation departments under their own tribal laws." *Id.* § 170.930. In addition, the regulations allow Tribes to take control of IRR funds pursuant to ISDEAA, which promotes "greater tribal self-reliance brought about through more 'effective and meaningful participation by the Indian people' in, and less 'Federal domination' of, 'programs for, and services to, Indians.'" *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. 1172, 1178 (2005); *see* 23 U.S.C. § 202(d)(3); 25 C.F.R. § 170.610 *et seq.* Congress also makes tribal governments an integral part of the state planning process. *See, e.g.*, 23 U.S.C. §§ 135(e)(2)(C), (f)(1)(B)(iii); *id.* § 135(d)(2).

4. The state tax directly frustrates the goals of this federal scheme. As Congress and the relevant federal agencies intended, the Tribe, in its capacity as a sovereign, has imposed a fuel tax to address the severe problems identified by the federal government, thereby allowing the reallocation of federal funds for other needed roads projects. Implementation of the State's tax with respect to on-reservation fuel would effectively eliminate the tribal tax.

The State's asserted right to determine unilaterally whether a Tribe may or may not effectively exercise its sovereign taxing authority to provide these critical

government services is inconsistent with the promotion of tribal sovereignty upon which the IRR Program is premised and with the express endorsement of a "tribal fuel tax" to accomplish the federal goals. In both *Bracker* and *Ramah*, this Court concluded that federal interests supported preemption even though the federal scheme failed to address expressly any aspect of sovereign taxing power. *See Ramah*, 458 U.S. at 841 n.5. Where, as here, the federal scheme expressly endorses using a tribal fuel tax to accomplish the federal goal, the federal interest in preempting an incompatible state tax is even stronger.

Bolstering the federal interest here is that state and local governments are a part of the problem. *See* ITA Amicus Br. 17-21. In assessing the effectiveness of the IRR Program, the Office of Management and Budget ("OMB") has determined that state and local governments "are refusing to use their [federal] funding to reconstruct [reservation] roads/bridges" and "do not maintain [reservation] roads adequately." Office of Mgmt. & Budget, Exec. Off. of the President, *PART Assessments, Dep't of the Interior* at 139, § 1.4, *available at* <http://www.whitehouse.gov/omb/budget/fy2006/pma/interior.pdf>. Tribes must thus redirect their federal funds, so that, "[i]n practice, non-BIA roads are being subsidized with IRR [federal] construction funds, effectively limiting the amount available for the reconstruction of BIA roads." *Id.* §§ 1.4, 1.5.

5. Other Acts of Congress strongly support preserving the tribal fuel tax. The Tribe's roads program is integrally related to its casino enterprise, and thus directly furthers the federal interests served by IGRA, which itself reflects "a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government."

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal quotation marks omitted). Congress passed IGRA to advance "tribal economic development, self-sufficiency, and strong tribal governments" through the establishment of Indian gaming enterprises. 25 U.S.C. § 2702(1).

The Tribe has used the casino precisely to this effect, relying on casino revenues to spur on-reservation economic development and to provide a full range of government services to members and non-members on the reservation – all as Congress intended. The Station, which is used overwhelmingly by casino patrons and employees, is an integral part of the casino enterprise, and part of the Tribe's effort to provide a full service resort to its customers. Moreover, the tribal tax revenues generated by the Station are used to improve the reservation infrastructure that is essential to the casino's success. *See supra* __. The federal interest in tribal self-sufficiency embodied in IGRA is thus directly advanced by the tribal tax and is jeopardized by the State's nullification of the tribal taxing power.

6. Finally, the Kansas Act for Admission provides that "nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property pertaining to the Indians of said territory." 12 Stat. 127, § 1 (1861); *see also In re Kansas Indians*, 72 U.S. 737, 756 (1866). Here, however, the State's boundaries result in such prohibited impairment, by precluding the Tribe's ability to tax: if not for the inclusion of the Tribe within the State's boundaries, the Tribe – which the State has recognized as a "separate and distinct nation[] inside the boundaries of the state of Kansas," *Kaul*, 970 P.2d at 65 – would be allowed the state exemption for out-of-state deliveries, and its rights would not then be impaired. *See*

K.S.A. § 79-3408(d)(1); *McClanahan*, 411 U.S. at 175-76 (relying on state enabling act in preemption analysis); *see also supra* p.16 n.3 (Kansas' statutes construed in favor of tribal taxpayer); Kansas Tribes Amicus Br. Part II.

In short, the State's tax "interfere[s] with the successful accomplishment of the federal purpose," *Mescalero II*, 462 U.S. at 336, of encouraging the exercise of tribal sovereignty to improve reservation roads and foster on-reservation economic development. The federal interest, like the tribal interest, thus weighs strongly in favor of preemption.

C. The State's Interests Are Minimal.

The State asserts an interest in its "sovereign power to tax its citizens" through the fuel tax because an "extensive, well-maintained road and bridge system is vital to the State's economy." Kan. Br. 11-12. But exempting delivery of fuel to the reservation from the state tax does not impair that interest in any material way. The fuel tax revenues generated by the Station amount to *less than one-tenth of one percent* of the total revenue the State collects through the fuel tax, and a trivial percentage of the total Kansas tax revenues (which were more than $6.1 billion in 2004). *See, e.g.*, *Mescalero II*, 462 U.S. at 343 (noting that the "loss of revenues to the State is likely to be insubstantial").

The State nevertheless claims it is justified in collecting all of the fuel tax for itself because "[m]ost of the non-Indian purchasers of the gasoline drive largely off-reservation." Kan. Br. 3-4. But many non-Indian drivers using tribal roads no doubt purchase their gasoline either off-reservation or at one of the two on-reservation stations that pay only the state tax. Because the Tribe sells fuel at market rates, there is no reason to believe (and the record supplies none) that the

market is distorted or that the State will be unfairly disadvantaged if the state tax is preempted.

Moreover, the State's effort to justify the fuel tax as a form of "use tax" for the privilege of driving on Kansas roads is specious. Kansas exempts the sale or delivery of fuel to other States, territories, foreign countries, and the United States without any determination of whether the ultimate purchasers of this fuel use Kansas roads. *See supra* Part I.B. The State cannot assert a legitimate interest in taxing all users of its roads when it exempts some users but not others. *Cf. Sac and Fox Nation,* 508 U.S. at 126-27 (striking down state road use tax where tax was "not imposed on all vehicles using the roads in Oklahoma" and where "[r]esidents of nearby States pay neither the excise tax nor the registration fee").

Similarly meritless is the State's contention that its tax is justified because "the distributor here is the state taxpayer" and the State provides services to the non-Indian distributor off the reservation. Kan. Br. at 39. But the distributor already pays taxes to the State for fuel that it uses personally when making deliveries over Kansas roads. Moreover, the State provides these same services to distributors providing fuel transported over Kansas roads to the United States and out of State, yet Kansas exempts those deliveries from the tax. The State's discrimination is further evidence of its diminished interest.

The State, citing *Cotton*, next claims its tax is permissible because the State and the County provide road services on the reservation. Kan. Br. at 38. But those state-provided services have little weight in the analysis. First, the State provides no services for tribally-maintained reservation roads. *See Cotton*, 490 U.S. at 184 (noting that State has no

interest in collecting revenue for use of roads that were "'built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors'") (quoting *Bracker*, 448 U.S. at 150). The state-provided services thus cannot justify the State's effort here to collect *all* tax revenues – from the Station, from the two other on-reservation gas stations that are immune from the tribal tax, and from the off-reservation stations located where drivers begin or end their journeys. Second, it is precisely because of inadequate funding and maintenance of roads on the reservation that the Tribe has taken over responsibility for roads previously maintained by the County and the State. *See* JA79 (noting failure of State and County to provide "proper road maintenance on the reservation"). To invoke inadequate maintenance now as a justification for the tax is to add insult to injury.[17]

Moreover, the neglect by the State and County of their obligation to provide services on the reservation belies the sincerity of the claimed state interest. The Tribe's fuel tax has allowed the Tribe to assume responsibility for reservation roads that the State and County would otherwise have to maintain. The tribal tax, which the State attempts to

[17] The State's suggestion that *Cotton* held that the provision of *any* on-reservation services is "dispositive" is thus meritless. Kan. Br. 39. *Cotton* did not involve the provision of inadequate state services, nor did the State's provision of some services allow it to seize *all* of the tax revenue, as the State seeks to do here.

There is, moreover, little in the record to support the State's contention that it provides substantial services on the reservation. The Tribe moved to exclude the State's evidence on this point, and the district court did not consider the evidence. JA 126-29. Most of the State's evidence concerned general services, rather than evidence of road construction and maintenance to which the state tax is dedicated. The remaining evidence does not remotely justify the State's capture of all fuel revenues.

displace, is thus consistent with the State's asserted interest in maintaining state and county roads. The only interest furthered by a displacement of a tribal tax dedicated to the upkeep of tribal roads is an interest in diverting funding away from such roads, which merits no weight at all.

Finally, the State complains that, "[w]ithout the ability to collect taxes to fund . . . services for 'internal order, improvement, and prosperity . . . ,' any notion of sovereignty is an illusion." Kan. Br. at 12 (quoting *The Federalist* (No. 45)). On this record, that is an extreme exaggeration. Moreover, it is precisely the *Tribe's* effort to fund services for "internal order, improvement, and prosperity" that the state tax entirely forecloses. The State's argument thus merely highlights both the State's cavalier disregard of the Tribe's legitimate interests in this case and its corresponding exaggerations of the state interests at stake.

* * *

Because the tribal and federal interests are so strong and the State's interest so comparatively weak, the Tenth Circuit correctly balanced the interests here.

IV. THE STATE TAX IMPERMISSIBLY INFRINGES THE TRIBE'S RIGHT TO SELF-GOVERNMENT.

The Kansas tax is also invalid on the "independent but related" ground that it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (quoting *Williams*, 358 U.S. at 220); *accord Mescalero II*, 462 U.S. at 334 n.16.[18]

[18] The Court has often had no need to pass on the infringement question, either because the preemption inquiry was dispositive or because the parties failed to raise the issue. *See, e.g.*, *Chickasaw*, 515 U.S. at 464.

The cases applying *Williams* "have dealt principally with situations involving non-Indians." *McClanahan*, 411 U.S. at 179. In those situations, where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," *id.*, the *Williams* test "resolve[s] th[e] conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected," *id.*; *see also id.* at 181 (denying state jurisdiction to tax); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (applying *Williams* and upholding tribal court jurisdiction).

Williams requires invalidation of the state fuel tax. As noted, "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government" that "enables a tribal government to raise revenues for its essential services." *Merrion*, 455 U.S. at 137; *see also Colville*, 447 U.S. at 152; *Rice*, 463 U.S. at 722. Here, it is not just the right to tax in the abstract that is at issue, but the Tribe's right – like that of the State and the United States – to impose a fuel tax to fund critical infrastructure projects that are essential to economic development and the provision of government services. Under *Williams*, the State could not have explicitly prohibited the Tribe from enacting a fuel tax. Yet the State's actions here – terminating the 1992 Agreement and eliminating the statutory exemption for the Tribe – have had the same effect. "The legal result must be the same, for what cannot be done directly cannot be done indirectly." *Carmell v. Texas*, 529 U.S. 513, 541 (2000) (quotation marks omitted). The Kansas fuel tax, no less than a direct prohibition, infringes on the Tribe's sovereign right to make its own tax laws and be ruled by them.

The State's principal response is that the infringement issue here "has never been raised." Kan. Br. 19 n.3. That

contention is frivolous. The Tribe raised the argument in the district court, and that court addressed the argument in detail. JA115-20. Similarly, the Tenth Circuit stated that "[t]he Nation asks us to invalidate the tax as it applies to the Nation's fuel *under two independent but related doctrines*. . . . [T]he Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government." JA135 (emphasis added); *see* Appellant's Br. 53-56 (10th Cir. filed Sept. 22, 2003) (raising infringement argument).

The State's only response on the merits is a cursory citation to *Cotton*. Kan. Br. 19 n.3. But *Cotton* noted expressly that the state tax did not affect the Tribe's ability to impose or raise taxes, 490 U.S. at 185; *see supra* pp. 31 & n.10, and thus *Cotton* does not aid the State. The state tax infringes the Tribe's governmental rights and independently requires invalidation of the state fuel tax here.

V. THE STATE'S PROPOSAL TO OVERRULE *BRACKER* SHOULD BE REJECTED.

Finally, the state proposes that *Bracker* be eliminated entirely, both on and off the reservation. For 30 years, however, this Court has confirmed that *Bracker*'s synthesis of 200 years of Indian law applies, including in three recent unanimous opinions. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999); *Chickasaw*, 515 U.S. at 458 (unanimous on this issue); *Milhelm Attea*, 512 U.S. at 73. The State must thus offer a "compelling justification" before this Court will "depart from the doctrine of *stare decisis*." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

The State disputes this heavy burden by suggesting that "[*s*]*tare decisis* is not an inexorable command in the area of constitutional law." Kan. Br. 22. But *stare decisis* has

reduced force in constitutional cases "because in such cases correction through legislative action is practically impossible." *Seminole Tribe*, 517 U.S. at 63 (internal quotation marks omitted). Congress "remains free to alter" this Court's decisions regarding federal preemption and tribal sovereignty, and this case is thus equivalent to a question of statutory interpretation for *stare decisis* purposes, where respect for precedent is strongest. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Congress has never indicated dissatisfaction with *Bracker*'s synthesis, and the State does not contend otherwise.

Nor is there any other reason to reconsider that synthesis. The status of Tribes remains "anomalous" and "complex." *Bracker*, 448 U.S. at 142. Challenges to state regulation of relationships between Tribes and non-members still present the "difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah*, 458 U.S. at 836-37. And Indian law still operates against the backdrop of "'tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero II*, 462 U.S. at 334. [19]

The State's main argument for discarding *Bracker*'s synthesis is its claim that the balancing test has proven unworkable. *See* Kan. Br. 22. But this court has had little trouble with its application, *see, e.g.*, *Milhelm Attea*, 512 U.S. 61 (unanimous opinion); *see also Ramah*, 458 U.S. at 846 (noting that this Court's "precedents announcing the

[19] *Bracker* thus comports with the many canons of Indian law that also "play an essential role in implementing the trust relationship between the United States and Indian tribes" by injecting consideration of tribal interests into the construction of federal statutes. Cohen, *supra*, at 225.

scope of pre-emption analysis in this area provide sufficient guidance"), and the State points to no crisis in the lower courts. Indeed, despite its rhetoric, the State cites only one Ninth Circuit case that it deems confusing. Kan. Br. 24.

Moreover, this Court has long recognized that, given the history and complicated interests at stake, ease of application is not the dominant consideration in Indian law. *See, e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (noting that "sovereign immunity bars the State from pursuing the most efficient remedy"); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 178 (1977). Petitioner's cries for "clear guidance, precise lines of demarcation," and its exaltation of categorical rules thus ring hollow here, Kan. Br. 32, for "[o]nly rarely does the talismanic invocation" of "rigid conceptions of state and tribal sovereignty shed light on difficult problems." *Colville*, 447 U.S. at 168 (Brennan, J., concurring); *see also Ramah*, 458 U.S. at 846.

The State's remaining arguments fare no better. It is simply not true that "in the taxation context . . . , more than any other area of civil regulation, concrete and reasonably *per se* rules are essential." Kan. Br. 22. The Federal Tax Code "makes liberal use of both situational rules [i.e., those that require a factual determination before the rule can be applied] and absolute rules." Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645, 685 (2003). Nor does this Court impose such rules at every opportunity. For example, in *Commissioner v. Soliman*, 506 U.S. 168, 174-75 (1993), the Court refused to "develop an objective formula that yields a clear answer in every case" regarding a taxpayer's principal place of business, and instead opted for a "more subtle" inquiry "dependent upon the particular facts of each case."

The State's reliance on *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), is similarly unavailing. Although the Court in *Quill* upheld a bright-line test for the applicability of a state tax, it relied principally on *stare decisis*. *See id.* at 317. Indeed, the Court noted, quite contrary to the State's argument, that its Commerce Clause jurisprudence concerning state taxes "now favors more flexible balancing analyses." *Id.* at 314.

Nor do *United States v. New Mexico*, 455 U.S. 720, 733 (1982) and *Blaze* provide strong reasons to abandon *Bracker*. *See* Kan. Br. 32. The Court in *New Mexico* adopted a narrow view of tax immunity for federal contractors because it recognized that "the political process is 'uniquely adapted to accommodating the competing demands in this area.'" 455 U.S. at 738. But the federal government's ability to protect its interests in Congress in competition with States does not mean that the Tribes have that same ability. *See Bracker*, 448 U.S. at 143-44 (noting that it is "treacherous to import" into Indian law notions of preemption that govern elsewhere). Moreover, in *Blaze*, this Court unanimously reaffirmed the applicability of *Bracker*. *See* 526 U.S. at 37.

Finally, eliminating balancing would have devastating consequences, spurring state taxation and regulation that would threaten tribal enterprises and even entire tribal regulatory schemes, such as those approved in *Bracker*, *Ramah*, and *Mescalero II*. There is no need – or reason – to eviscerate the policy of promoting tribal self-government and economic independence that Congress has long embraced.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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Appendix A

Statutory Provisions Involved

K.S.A. § 79-3401

KANSAS STATUTES ANNOTATED
CHAPTER 79.--TAXATION
ARTICLE 34.--MOTOR VEHICLE FUEL TAXES
MOTOR-VEHICLE FUELS AND SPECIAL FUELS

79-3401. Citation of act; definitions.

This act, and amendments thereto, shall be known and may be cited as the "motor-fuel tax law," and as so constituted is hereinafter referred to as "this act." The following words, terms and phrases, when used in this act, shall have the meanings ascribed to them in this section, except in those instances clearly indicating a different meaning:

(a) "Aviation fuel" means motor fuels for use as fuel for aircraft;

(b) "agricultural ethyl alcohol" means a motor-vehicle fuel component with a purity of at least 99%, exclusive of any added denaturants, denatured in conformity with one of the methods approved by the United States department of the treasury, bureau of alcohol, tobacco and firearms, and distilled in the United States of America from grain produced in the United States of America;

(c) "bulk plant" means a motor fuels storage facility, other than a terminal, that is primarily used to redistribute motor fuels;

(d) "dealer" means any person engaged in the retail sale of motor-vehicle fuels or special fuels;

(e) "director" means the director of taxation, a duly authorized deputy, agent or representative;

(f) "distributor" means any person, who:

(1) Imports or causes to be imported from any other state or territory of the United States motor-vehicle fuels or special fuels for such person's own use in the state of Kansas, or for sale and delivery therein, after the same shall have come to rest or storage therein, whether or not in the original package, receptacle or container; or

(2) Imports or causes to be imported, from a foreign country, motor-vehicle fuels or special fuels for such person's own use in the state of Kansas, or for sale and delivery therein, after the same shall have come to rest or storage, whether or not in the original package, receptacle or container;

(3) Purchases or receives motor-vehicle fuels or special fuels in the original package, receptacle or container in the state of Kansas for such person's own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, or any other nation, in case such motor-vehicle fuels or special fuels have not, prior to such purchase or receipt, come to rest or storage in the state of Kansas; or

(4) Received and, in any manner, uses, sells or delivers motor-vehicle fuels or special fuels in the state of

Kansas on which the tax provided for in this act has not been previously paid;

(g) "exporter" means any person who exports or causes to be exported motor vehicle fuels or special fuels from Kansas to any other state or territory of the United States or to a foreign country, for such person's own use or for sale or delivery therein, whether or not in the original package, receptacle or container;

(h) "importer" means any person who imports or causes to be imported motor-vehicle fuels or special fuels from any other state or territory of the United States or from a foreign country, for such person's own use in the state of Kansas or for sale or delivery therein, whether or not in the original package, receptacle or container;

(i) "liquid fuels" or "motor fuels" means any inflammable liquid by whatever name such liquid shall be known or sold, which is used, or practically or commercially usable, either alone or when mixed or combined in an internal-combustion engine for the generation of power;

(j) "manufacturer" or "refiner" means any person who or which produces, refines, prepares, blends, distills, manufactures or compounds motor-vehicle fuels or special fuels in the state of Kansas for such person's own use therein, or for sale or delivery therein. The term "manufacturer" shall not include any person who or which mechanically separates liquids from natural gas at production facilities or gathering system pipelines on the lease. No person who produces, refines, prepares, blends, distills, manufactures, or compounds motor-vehicle fuels or special fuels shall be required to render a distributor's (manufacturer's) report as to any particular lot or lots of motor-vehicle fuels or special fuels until such motor-

vehicle fuels or special fuels have been loaded at a refinery or other place of production into tank cars, or placed in any tank at such refinery or other place of production from which any withdrawals are made direct into tanks, tank wagons or other types of transportation equipment, containers or facilities;

(k) "motor vehicle" means a motor vehicle as defined by K.S.A. 8-126, and amendments thereto, and which is required to be registered pursuant to K.S.A. 8-126 et seq., and amendments thereto;

(l) "motor-vehicle fuels" means gasoline, casinghead gasoline, natural gasoline, drip gasoline, aviation gasoline, gasohol, gasoline-oxygenate blend and any other spark-ignition motor fuel as defined by the 1995 United States department of commerce, national institute of standards and technology handbook 130 issued December of 1994, and as may subsequently be defined in rules and regulations which the director may adopt pursuant to K.S.A. 79-3419, and amendments thereto;

(m)"oil inspector" means the director of taxation, a duly authorized deputy, agent or representative;

(n) "person". means every natural person, association, partnership, limited partnership, limited liability company or corporation. When used in any statute, prescribing and imposing a fine or imprisonment, or both, the term "person" as applied to firms and associations means the partners or members thereof and, as applied to corporations, the corporation and the officers thereof;

(o) "public highways" means and includes every way or place, of whatever nature, generally open to the use of the public as a matter of right, for the purposes of vehicular

travel and notwithstanding that the same shall have been temporarily closed for the purpose of construction, reconstruction or repair;

(p) "received" means motor-vehicle fuel or special fuel produced, refined, prepared, distilled, manufactured, blended or compounded at any refinery or other place, in the state of Kansas by any person, or imported into this state from any other state, territory, or foreign country by pipeline or connecting pipeline at a pipeline terminal or pipeline tank farm for storage, shall be deemed to be "received" by such person thereat when the same shall have been loaded at such refinery, pipeline terminal, pipeline tank farm or other place, into tank cars, tank trucks or other container, or placed in any tank from which any withdrawals are made direct into tank cars, tank trucks or other types of transportation equipment, containers or facilities;

(q) "retailer" means a person that engages in the business of selling or distributing motor fuels to the end user;

(r) "school bus" means every bus, as defined by K.S.A. 8-1406, and amendments thereto, which is: (1) Privately owned and contracted for, leased or hired by a school district or nonpublic school for the transportation of pupils, students or school personnel to or from school or to or from school-related functions or activities; or (2) owned and operated by a school district or nonpublic school which is registered under the provisions of K.S.A. 8-126 et seq. , and amendments thereto, used for the transportation of pupils, students or school personnel to or from school or to or from school-related functions or activities;

(s) "special fuels" means all combustible liquids suitable for the generation of power for the propulsion of motor vehicles including, but not limited to, diesel fuel, alcohol and such fuels not defined under the motor-vehicle fuels definition, hereinafter referred to as motor-vehicle fuel;

(t) "terminal" means a fuel storage and distribution facility that is supplied by motor vehicle, pipeline or marine vessel, and from which motor fuels may be removed at a rack. "Terminal" does not include any facility at which motor fuel blend stocks and additives are used in the manufacture of products other than motor fuels and from which no motor fuels are removed;

(u) "terminal operator" means the person who by ownership or contractual agreement is charged with the responsibility for, or physical control over, and operation of a terminal;

(v) "transporter" means a person who has been issued a liquid-fuels carrier's license pursuant to K.S.A. 55-506 et seq. , and amendments thereto.

K.S.A. § 79-3402

79-3402. Purpose of tax.

The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and

employees incurred in administration and enforcement of this act and for no other purpose whatever.

* * * *

K.S.A. § 79-3408

79-3408. Tax imposed on use, sale or delivery of motor-vehicle fuels or special fuels; pumps labeled to show alcohol content; incidence of tax imposed on distributor; allowance for certain losses; exempt transactions; reports required.

(a) A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

(b) Every retail pump for motor-vehicle fuels shall be conspicuously labeled to show the content and percentage of any ethyl alcohol or other alcohol combined or alone in excess of 1% by volume.

(c) Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein, except that an allowance of 2.5% shall be made and deducted by the distributor to cover all ordinary losses which may have resulted from physical loss while handling such motor-vehicle fuels or special fuels. No such allowance shall be made on any motor-vehicle fuel or special fuel exported from the state or sold to the

United States of America or any of its agencies or instrumentalities as are now or hereinafter exempt by law from liability to state taxation. No such allowance shall be made for any motor-vehicle fuel or special fuel sold or disposed of to a consumer in tank car, transport or pipeline lots.)

(d) No tax is hereby imposed upon or with respect to the following transactions:

(1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

(2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation.

(3) The sale or delivery of motor-vehicle fuel or special fuel to a contractor for use in performing work for the United States or those agencies of the United States above mentioned, provided such contractor has in effect with the United States or any such agency a cost-plus-a-fixed-fee contract covering the work.

(4) The sale or delivery of motor-vehicle fuel or special fuel which is aviation fuel.

(5) The first sale or delivery of motor-vehicle fuel or special fuel from a refinery, pipeline terminal, pipeline tank farm or other place to a duly licensed distributor who in turn resells to another duly licensed distributor.

(6) The sale or delivery of special fuel which is indelibly dyed in accordance with regulations prescribed pursuant to 26 U.S.C. 4082 and such special fuel is only used for nonhighway purposes.

(7) The sale of kerosene used as a fuel only to power antique steam motor vehicles first manufactured prior to 1940.

(e) Each distributor, manufacturer, importer, exporter or retailer shall make full reports and furnish such further information as the director may require with reference to all transactions upon which no tax is to be paid.

K.S.A. § 79-3409

79-3409. Distributor to collect tax; price sign requirements.

Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor-vehicle fuels or special fuels sold or delivered by such distributor, as a part of the selling price. When the price of motor-vehicle fuels or special fuels posted on a price sign does not include the state and federal tax which such retail dealer's distributor paid or for which the distributor was liable, the total of the taxes must be shown in numbers the same size as the price of the motor fuel. Any deviation from the maximum price charged for a given grade of motor-vehicle fuels or special fuels must be stated in letters at least six inches high and legible. Fractions of cents must be posted in numbers at least 1/5 the height of the whole number.

* * * *

K.S.A. § 79-3417

79-3417. Refunds for lost or destroyed fuels; procedure.

Every distributor shall be entitled to a refund from the state of the amount of motor-vehicle fuels or special fuels tax paid on any motor-vehicle fuels or special fuels of 100 gallons or more in quantity, which are lost or destroyed at any one time while such distributor is the owner thereof, through theft, leakage, fire, explosion, lightning, flood, storm or other cause beyond the control of the distributor. Such distributor shall notify the director in writing of such loss or destruction, the specific cause thereof, and the amount of motor-vehicle fuel or special fuel so lost or destroyed, within 60 days from the date of such loss or destruction. Within 30 days after notifying the director of such loss or destruction such distributor shall file with the director an affidavit on oath, stating the full circumstances and amount of the loss or destruction and other information requested by the director.

The director shall examine all such claims and determine the amount to which the claimant is entitled. If any distributor entitled to a refund owes the state any motor-vehicle fuel or special fuel tax, penalties, or interest, the refund authorized by this section shall be credited upon such taxes, penalties and interest. When the director determines that any distributor is entitled to a refund under this section, and such refund cannot be effected by giving credit therefor, the director shall sign a voucher for the refund. Such amount shall be paid to the distributor from the revenue administration fee fund.

* * * *

K.S.A. § 79-3425

79-3425. Payment into state treasury; distribution of proceeds of tax.

All of the amounts collected under the motor-fuel tax law and amendments thereto, except amounts collected pursuant to K.S.A. 79-3408c, and amendments thereto, shall be remitted by the director to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury. The state treasurer shall credit such amount as the director shall order in the motor-vehicle fuel tax refund fund to be used for the purpose of paying motor-vehicle fuel tax refunds as provided by law. The state treasurer shall credit the remainder of such amounts as follows: To the state highway fund amounts specified in K.S.A. 79-34,142, and amendments thereto, to a special city and county highway fund which is hereby created, amounts specified in K.S.A. 79-34,142, and amendments thereto, to be apportioned and distributed in the manner provided in K.S.A. 79-3425c, and amendments thereto, and to the current production account and the new production account of the Kansas qualified agricultural ethyl alcohol producer incentive fund, which is hereby created in the state treasury, in the amount and in the manner specified in K.S.A. 79-34,161, and amendments thereto, to be expended in the manner provided in K.S.A. 79-34,162, and amendments thereto.

* * * *

K.S.A. § 79-34,141

79-34,141. Rates of tax per gallon on vehicle fuels.

On and after July 1, 2002, until July 1, 2003, the tax imposed under this act shall be not less than:

(a) On motor-vehicle fuels, $.23 per gallon, or fraction thereof;

(1) on special fuels, $.25 per gallon, or fraction thereof; and

(2) on LP-gas, $.22 per gallon, or fraction thereof.

(b) On and after July 1, 2003, until July 1, 2020, the tax imposed under this act shall be not less than:

(1) On motor-vehicle fuels, $.24 per gallon, or fraction thereof;

(2) on special fuels, $.26 per gallon, or fraction thereof; and

(3) on LP-gas, $.23 per gallon, or fraction thereof.

(c) On and after July 1, 2020, the tax rates imposed under this act shall be not less than:

(1) On motor-vehicle fuels, $.18 per gallon, or fraction thereof;

(2) on special fuels, $.20 per gallon, or fraction thereof; and

(3) on LP-gas, $.17 per gallon, or fraction thereof.

K.S.A. § 79-34,142

79-34,142. Distribution of proceeds of vehicle fuel taxes.

(a) On and after July 1, 2002, until July 1, 2003, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118 and amendments thereto as follows: To the state highway fund 64.6% and to the special city and county highway fund 35.4%.

(b) On and after July 1, 2003, until July 1, 2020, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118, and amendments thereto, as follows: To the state highway fund 66.37% and to the special city and county highway fund 33.63%.

(c) On and after July 1, 2020, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118 and amendments thereto as follows: To the state highway fund 55.3% and to the special city and county highway fund 44.7%.

POTAWATOMI LAW AND ORDER CODE

TITLE 10
GENERAL REVENUE AND TAXATION

CHAPTER 10-6
MOTOR FUEL TAX

Section 10-6-1. Tax on Motor Fuel

(A) There is hereby imposed a tax for the privilege of doing business which is measured by the sale of motor fuel within the tribal jurisdiction, which includes, without limitation, the entire Prairie Band Potawatomi Reservation territory. This tax shall be as follows:

(1) **Gasoline Motor Fuel.** A tribal tax equal to 20 cents for each gallon of gasoline or gasohol sold at retail.

(2) **Diesel Motor Fuel.** A tribal tax equal to 22 cents for each gallon of diesel fuel sold at retail.

The effective date for the tax rates specified in this subsection shall be January 1, 2003.

(B) The retailer of the motor fuel is the taxpayer. The above taxes shall be paid by the retailer and its shall be the duty of the retailer to collect and remit the tax from the payment made by the purchaser to the retailer, to file monthly returns with the Tax Commission, and to pay to the Tax Commission the taxes that are required to be collected.

(Amended by PBP TC No. 2000-26, February 1, 2000; amended by PBP TC No. 2002-149, December 5, 2002.)

Section 10-6-2. Payment of the Tax.

(A) Every retailer shall submit to the Tax Commission within fourteen (14) calendar days after the end of each calendar month a report which states the gallons of motor fuel sold and amount of taxes due and collected during the calendar month. The monthly report shall state the name, address and telephone number of all distributors and transporters from whom the retailer has received deliveries of motor fuel and the gallons of each kind of motor fuel received.

(B) Every retailer shall pay the taxes collected or required to be collected during the calendar month to the Tax Commission at the same time as the report for the calendar month is submitted.

Section 10-6-3. Estimates for Unreported Taxes.

In the event the retailer fails to file a full and complete report as required above, the Tax Commission may estimate and assess the tax liability for the retailer based upon estimates of motor fuel sales at the retailer's location.

Section 10-6-4. Lien for Unpaid Taxes.

All taxes, interest and penalties for unpaid motor fuel taxes or for any of the other unpaid taxes imposed under tribal law shall be a lien upon all real, personal or other property of the retailer which is located within the tribal jurisdiction.

Section 10-6-5. Liability of Officers, Directors and Managers.

The officers and directors of a corporation which is making retail sales for which a tax is imposed under this title shall be personally liable for any unpaid taxes, interest and penalties. Any other managers or employees of a corporation who disburse business funds at a time when tribal taxes are due and unpaid shall be personally liable for such taxes, interest and penalties.

Section 10-6-6. Reports of Distributors and Transporters.

A distributor or transporter of motor fuel, upon request of the Tax Commission, shall provide a detailed report of all motor fuel deliveries made within the tribal jurisdiction. In the event of the failure or refusal to provide such a report, the distributor or transporter shall be liable for a $100 civil penalty for each day for which there is a refusal or failure.

(Amended by PBP TC No. 2000-82, May 2, 2000)

Section 10-6-7. Use of Tribal Motor Fuel Tax Revenue.

All tribal motor fuel tax revenue imposed and collected hereunder shall be used by the Prairie Band Potawatomi Nation's government for the purpose of constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation.

Section 10-6-8. Effective Date.

The provisions of this resolution shall take effect on the first day of the month following the month in which this resolution is approved by the Tribal Council.

(Title 10-6 enacted by PBP TC No. 99-1, January 11, 1999; amended by PBP TC No. 99-66, May 11, 1999; amended by PBP TC No. 2000-82, May 2, 2000)

(Title 10 enacted by PBP TC No. 87-37, August 26, 1987; amended by PBP TC, July 20, 1989; amended PBP TC No. 92-66, November 18, 1992; Title 10-6 enacted by PBP TC No. 99-1, January 11, 1999; amended by PBP TC No. 99-66, May 11, 1999; amended by PBP TC No. 2000-26, February 1, 2000; amended by PBP TC No. 2000-82, May 2, 2000; amended by PBP TC No. 2000-82, May 2, 2000; December 5, 2002, amended by PBP TC No. 2002-149)

APPENDIX B

KANSAS DEPARTMENT OF REVENUE
CUSTOMER RELATIONS
TOPEKA, KANSAS 66625-8000
www.ksrevenue.org
Phone Number (785) 368-8222
FAX (785) 296-6993

For Office Use Only

DISTRIBUTORS TAX RETURN For Month of

License #

Form #

Tax should be computed at the rate of:	GASOLINE .24	GASOHOL .24	SPECIAL FUEL .26
SEE INSTRUCTIONS ON REVERSE	Gasoline	Gasohol	Special Fuel
1. Total net gallons of gasoline, gasohol and special fuel received or imported. (Attach MF-52a, Schedule of Receipts)			
2. Deductions - Net Gallons Only (Attach MF-52b, Schedule of Disbursements)	Gasoline	Gasohol	Special Fuel
(a) Exports			(DO NOT INCLUDE DYED DIESEL.)
(b) U.S. Govt.			(DO NOT INCLUDE DYED DIESEL.)
(c) Aviation			(DO NOT INCLUDE DYED DIESEL.)
(d) N/A as of 7/1/95			(see instructions on reverse)
(e) Dyed Diesel			(see instructions on reverse)
(f) Total of Lines 2(a) through 2(e)			
3. Net gallons after deductions (Line 1 less Line 2(f))			
4. Does not apply as of 7/1/95			
5. Sales to consumers in tank car, transport or pipeline lots (See instructions on reverse)			
6. Net gallonage on which allowance applies. Line 3 plus line 4 less line 5			
7. Less handling allowance (See instructions on reverse) NO ALLOWANCE FOR IMPORTERS			
8. Gallons subject to tax (Line 6 less line 7 plus line 5)			
9. Tax (Line 8 times appropriate rate)			
10a) Total Gas & Gasohol Tax Due	10b) Total Special Fuel Tax Due		
11 (a) Total Gas & Gasohol Penalty & Interest	11(b) Total Special Fuel Penalty & Interest		
12a) Total Gas & Gasohol Amount Due	12b) Total Special Fuel Amount Due		
13) Amount Remitted. Payable to the Director of Taxation. Line 12a plus Line 12b)			

I certify that this is a true, complete and accurate return for the period stated above.

Signature _____

MF 52
(Rev. 10/03)

Title Telephone No.

BEST AVAILABLE COPY

INSTRUCTIONS FOR MOTOR VEHICLE FUELS TAX RETURN (MF/52)

This report must be prepared for each calendar month and must be postmarked on or before the 25th of the following month. If you have no receipts or imports during the month, write across the face of the report "No motor vehicle fuels or special fuels received (or imported) this month". Failure to report as specified will cause the addition of penalty at 5% of tax and interest at the appropriate rates as found on our web site: **www.ksrevenue.org**. ROUND GALLONS TO THE NEAREST WHOLE GALLON - DO NOT ROUND DOLLAR FIGURES (INCLUDE CENTS).

1. Receipts - Enter the total net gallons of gasoline, gasohol and special fuel received or imported. (*Include dyed diesel fuel received if applicable. Sales to other licensed distributors are not to be included in line 1 of the return nor in any other lines of the tax return. However, a schedule of disbursements must be completed for these sales).*

2. Deductions - Enter the deductions that apply to your business. Use net gallons only.
   a) Exports - Net gallons of fuel exported from Kansas. *(Dyed diesel is not to be included. All dyed diesel is reported in line 2e. If dyed diesel is exported, you must include a schedule of disbursements for this fuel.)*
      Attach (2) Copies Schedule of Disbursements.
   b) U.S. Government - Net gallons of fuel sold to the U.S. Government. *(Dyed diesel is not to be included. All dyed diesel is reported in line 2e. If dyed diesel is sold to the U.S. Government, you must include a schedule of disbursements for this fuel.)*
      Attach (1) Copy Schedule of Disbursements.
   c) Aviation - Net gallons of fuel sold for aviation purposes.
      Attach (1) Copy Schedule of Disbursements.
   d) Not applicable as July 1, 1995.
   e) Dyed Diesel - Net gallons of dyed diesel fuel *received* for the month - these gallons should be the same gallons included in line 1.
   f) Total of lines 2a through 2e.

3. Net gallons after deduction - (line 1 minus line 2f).

4. Does not apply as of July 1, 1995.

5. Sales to consumers in tank car, transport, or pipeline lots - Net gallons of taxable fuel sold directly to consumers. (*These gallons are subject to fuel tax but cannot be used when computing the handling allowance.)*

6. Net gallonage on which allowance applies - Line 3 (net gallons after deduction) minus line 5 (sales to consumers).

7. Handling allowance - Use 2.5% of line 6 for total gallons of gasoline, gasohol and special fuel.
   Importers are not allowed a handling allowance.

8. Gallons subject to tax - Line 6 (net gallons on which allowance applies) minus line 7 (handling allowance) plus line 5 (sales to consumers).

9. Tax - Line 8 gallons subject to tax - (multiplies by the appropriate tax rate).

10. Sum of total tax due.

    10a) Total of gas (line 9) plus Total gasohol (line 9).
    10b) Total of special fuel (line 9).

11. Penalty and interest (If filing a late return, add penalty at 5% of tax and interest at the appropriate rates as found on our web site: www.ksrevenue.org.)

12. Total Amount Due - (line 10 plus line 11).

13. Amount remitted - (Total of line 12a plus line 12b).

APPENDIX C

KANSAS DEPARTMENT OF REVENUE
CUSTOMER RELATIONS
915 SW HARRISON ST.
TOPEKA, KANSAS 66625-2000
Phone Number: (785) 368-8222
www.ksrevenue.org

MOTOR FUEL TAX MULTIPLE SCHEDULE OF RECEIPTS GASOLINE

COMPANY NAME | FEIN NO. | LICENSE NO. | TYPE OF SCHEDULE | MONTH & YEAR

TYPE OF SCHEDULE
1 Gallons received tax paid
2 Gallons received from licensed motor fuel distributors tax unpaid
3 Gallons exported from another state direct to customers

PC - TYPE OF PRODUCT
65 - GASOLINE
122 - BLENDING COMPONENTS
123 - ALCOHOL
124 - GASOHOL
125 - AVIATION GASOLINE
OTHER (see FTA Product Code list)

(1) NAME OF CARRIER	(2) CARRIER FEIN	(3) MODE	(4) POINT OF ORIGIN CITY, STATE	(5) POINT OF DESTINATION CITY, STATE	(6) ACQUIRED FROM NAME OR DISTRIBUTOR LICENSE #	(7) SELLERS FEIN	(8) DATE	(9) MANIFEST NUMBER	(10) NET GALS	PC
								TOTAL		

MF-52A (Gasoline)
(Rev. 4/04)

SEE INSTRUCTIONS ON REVERSE

INSTRUCTIONS FOR SCHEDULE OF RECEIPTS, GASOLINE (MF-52A)

This schedule(s) provides detail in support of the gallons shown as receipts on line 1 of the distributor's return. Each receipt of product must be listed on separate lines of the appropriate schedules.

Schedule Type - Enter the appropriate schedule number, using separate schedules for each fuel type.

Column Instructions

Columns 1 & 2
Carrier - Enter the name and FEIN of the company that transports the products.

Column 3
Mode of Transport - Enter the mode of transport. Use one of the following: J - Truck, PL - Pipeline, B - Barge, R - Rail, O - Other.

Column 4
Point of origin - Enter the location from which the product was transported. (IRS Terminal Code may be substituted in place of origin city and state.)

Column 5
Point of destination - Enter the city and state of the final destination.

Column 6
Acquired From - Enter the name or Distributor license number from which product was acquired (Company that is listed in column 6).

Column 7
Seller's FEIN - Enter the FEIN of the company from which the product was acquired.

Column 8
Date of Manifest.

Column 9
Manifest Number - Enter the manifest/bill of lading number.

Column 10
Net gallons only. Provide a grand total for this column that can be carried forward to the distributor's return.

PC - Product Code - Enter the appropriate product code.

No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE INTER-TRIBAL TRANSPORTATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
GLOSSARY OF ACRONYMS	vii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY	3
ARGUMENT	
I. Indian Reservation Roads are Generally in Substandard, Sometimes Appalling, Condition	5
II. While the Federal Government is Extensively Involved in Improving and Maintaining Indian Reservation Roads, the Funding Levels are Far Below What is Necessary to Sustain a Safe and Productive Roads System	10
III. Some Tribes Must Spend Money on State Roads Because Many States Have Failed to Fulfill Their Legal Responsibilities to Fairly Allocate Federal and Local Funds to Construct and Maintain Indian Reservation Roads	17
CONCLUSION	21
ATTACHMENT A	
List of Members of Amicus Intertribal Transportation Association 2005	1a

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Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 5, 21
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23 U.S.C. § 120(f) 18
23 U.S.C. § 134 12
23 U.S.C. § 135 12
23 U.S.C. § 202(d) (2)(c) 16
23 U.S.C. § 204 11

TABLE OF AUTHORITIES – continued

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25 C.F.R. § 170.302 14
25 C.F.R. § 170.5 5
25 C.F.R. § 170.412-415 16, 17
25 C.F.R. § 170.424 16, 17
25 C.F.R. § 170.435-431 16, 17
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OMB PART at 144 15

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GLOSSARY OF ACRONYMS

BIA	Bureau of Indian Affairs
FHP	Federal-aid Highway Program
FHWA	Federal Highway Administration
HTF	Highway Trust Fund
IRR	Indian Reservation Roads
ISDA	Indian Self Determination Act
NHTSA	National Highway Traffic Safety Administration
OMB PART	Office of Management and Budget, Program Assessment Review Tool
PBPN	Prairie Band Potawatomi Nation
STAA	Surface Transportation Assistance Act
TEA-21	1998 Transportation Equity Act for the 21st Century

BRIEF OF THE INTERTRIBAL TRANSPORTATION ASSOCIATION, THE MORONGO BAND OF MISSION INDIANS AND THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

> *"The Indian Reservation Roads System is among the most rudimentary of any transportation network in the United States . . . over 66% are unimproved, earth and gravel roads . . . some roads resemble roads in developing nations . . . ."*
>
> Bureau of Indian Affairs, Transportation Serving Native American Lands: TEA-21 Reauthorization Resource Paper (2003)

> *"Local public entities are refusing to use their Highway Trust Funds to reconstruct their roads/bridges when they have met their design life, forcing tribes to redirect their Indian Reservation Roads Highway Trust Funds to reconstruct these roads/bridges."*
>
> Office of Management and Budget (OMB), Program Assessment Review Tool: Indian Roads (2004)

INTEREST OF AMICI CURIAE[1]

Amicus Intertribal Transportation Association (ITA) was founded in 1993 to assist Indian tribes with the critical

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[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than *amici* or their members made a monetary contribution to the preparation or submission of this brief. Respondent is a member of ITA but has made no special contribution to the ITA or anyone else with respect to this brief.

road and other transportation issues that they confront as sovereign governments. ITA has member tribes in 13 mostly western states.[2] ITA works closely with federal and tribal officials, and to the extent possible, with state and local governments, on transportation matters central to the revitalization of tribal governments and their economies.

Amicus Morongo Band of Mission Indians is a federally-recognized Indian tribe located in south-central California. A safe and reliable roads system is essential to the Morongo Band's economic development program, which includes tourism, agriculture and mining activities. Due to the deteriorated condition of Riverside County roads serving its Reservation, the Morongo Band recently assumed responsibility for those roads and invested significant tribal resources for their reconstruction.

Amicus Three Affiliated Tribes of the Fort Berthold Reservation (Three Affiliated Tribes) are federally-recognized Indian tribes residing on the Fort Berthold Indian Reservation in North Dakota. The Three Affiliated Tribes' Transportation Department constructs roads, walkways, and other transportation facilities reservation-wide. It cooperates with the State and counties on projects for public access. The Tribes' Maintenance Department maintains more than 200 miles of federal roads on the Reservation, as well as roads to tribal members' homes. It also performs snow removal on more than eighty miles of state and county roads.

The state of Indian reservation roads is a national scandal. The neglect of those roads results from inadequate federal funding and the refusal of states to fulfill their statutory and regulatory duties to maintain their roads on and

[2] A list of ITA members is attached as Attachment A.

leading to Indian reservations.[3] This neglect has hindered economic development not only on reservations but in neighboring communities as well. Amici have a strong interest in ensuring that tribes retain the ability, as sovereign governments, to levy fuel taxes and employ other mechanisms necessary to deliver safe and adequate transportation services to their tribal members and neighboring communities.

INTRODUCTION AND SUMMARY

Roads in the United States are funded by a federal-state relationship based uniquely on motor fuel taxes. The federal motor fuel tax is gathered into the Highway Trust Fund and then distributed to states earmarked for construction. In addition, each state also has its own motor fuel tax and is legally responsible for maintaining roads built with federal funds. Although motor fuel tax rates vary, on average, roughly 50% of state transportation funding comes from Federal Highway Trust Funds, and 50% comes from state revenues largely derived from state motor fuel taxes.[4]

Unfortunately, the funding relationship that has worked so well for roads in the country generally, does not exist with respect to Indian reservations. Tribal governments receive some funding for road construction from the federal Highway Trust Fund, but it is much less on a per road mile basis than what states receive for similar roads. Moreover, congressional appropriations for maintaining federal roads on reservations are wholly inadequate. State governments

[3] For the purposes of this amicus brief, the term "state" includes all state and local governments.

[4] *See* U.S. Dep't of Transp., Federal Highway Administration. Highway Statistics, 2001. Table HF-2, Total Disbursement for Highways (January 2002).

provide little or no funding for roads construction or maintenance in Indian country despite their federal statutory obligations to do so. *See* 23 U.S.C. § 116; 23 U.S.C § 204(c).

The result has been a system of roads that "resemble roads in developing nations."[5] Faced with the complete inadequacy of funding from other sources and with road conditions that imperil the well-being of their citizens and stifle economic growth, tribal governments, as responsible sovereigns, have sought other sources of revenue to fund critical transportation projects. The most logical source – one that is expressly recognized by federal regulations – has been for tribes to levy motor fuel taxes, just as the federal and state governments do. But states like Kansas have been unwilling to let tribes do just that, even where tribes are seeking to levy taxes only on fuel sold at tribally-owned gas stations on their reservations. They have instead sought to reach into the reservations and impose their own motor fuel taxes, thereby displacing tribal governments' efforts to improve their sorely lacking transportation infrastructure.

This Court has repeatedly guarded against efforts by states to destroy the ability of tribes to act as responsible sovereign governments. Tribes have the right "to make their own laws and be ruled by them," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), and "state jurisdiction should not be asserted in a manner which 'frustrates tribal self-government.' " *Washington v. Confederated Colville Tribes*, 447 U.S. 134, 186-87 (1980)

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[5] Bureau of Indian Affairs, Transportation Serving Native American Lands: TEA-21 Reauthorization Resource Paper (2003) at 16 [hereinafter BIA Transportation Report]. Available at <http://198.104.130.237/ncai/advocacy/cd/docs/transportation-bia_tea21_reauthorization.pdf>

(Rehnquist, J.). "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." *Colville*, 447 U.S. at 153 (Opinion of the Court). That power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). As is true for other sovereigns, taxation enables "a tribal government to raise revenues for its essential services." *Id.*

This case concerns the ability of tribes to continue levying taxes in order to provide one such essential service – a safe and reliable transportation infrastructure. Kansas and its allies would have this Court rewrite existing doctrine to give states the exclusive right to finance their road infrastructure out of motor fuel taxes and preempt the tribes' ability to do the same. This Court should not lend its sanction to this effort.

ARGUMENT

I. INDIAN RESERVATION ROADS ARE GENERALLY IN SUBSTANDARD, SOMETIMES APPALLING, CONDITION

Indian Reservation Roads (IRR) are public roads located within or providing access to Indian lands.[6] The majority of roads in the IRR system are state roads (totaling 38,000 miles of road), while Bureau of Indian Affairs (BIA) and tribal roads make up the remaining 25,000 miles of the IRR system.[7]

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[6] *See* 23 U.S.C. § 101(a)(12); *see also* 25 C.F.R. § 170.5 [69 Fed. Reg. 43090, 43106 (2004)].

[7] *See* Indian Reservation Roads (IRR) Program Final Rule, Preamble, 69 Fed. Reg. 43090 (2004).

The IRR system is fundamental to Indian communities – it is intended to connect housing, health centers, schools, emergency services, employment centers and to open access for tourism and resource use.[8] Yet, the IRR system is "among the most rudimentary of any transportation network in the United States." *Id.* Over 66 percent of the IRR system contains unimproved earth and gravel roads.[9] The BIA reports that 72% of all roads in the IRR system are in poor condition. *See* BIA Transportation Report, *supra* note 5, at 16. Additionally, of the 4,394 bridges on the IRR system, 1,069 bridges are so deteriorated as to be classified as either functionally or structurally deficient. *Id.* at 12.

Poor roads endanger motorists and pedestrians. *See* BIA Transportation Report at 16. Many IRR roads are one lane, unimproved earth roads with little or no signage, inadequate safety barriers, no drainage, and no shoulders. *Id.* at 11. Not surprisingly, given these conditions, motor vehicle accidents are more likely to result in fatalities and severe injuries on IRR roads than on other roads. *See* Nat'l Ctr. for Statistics and Analysis, Nat'l Highway Traffic Safety Admin., Fatal Motor Vehicle Crashes on Indian Reservations: 1975-2002, p. 2 (2004) [hereinafter NHTSA Fatal Crashes].[10]

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[8] *Proposals to Amend the Indian Reservation Roads Program (S.281), the Indian Tribal Surface Transp. Improvement Act of 2003, and the Tribal Transp. Program Improvement Act of 2003 (S. 725): Hearing Before Senate Comm. on Indian Affairs*, 109th Cong. (2004) [hereinafter *Proposals Hearing]* (statement of Arthur Hamilton, Assoc. Adm'r for Federal Lands Highways, FHWA).

[9] *Id.*

[10] The NHTSA Fatal Crashes report is available at <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2004/809727.pdf>

The annual motor vehicle crash fatality rate on IRR roads is more than four times the national average. *See* BIA Transportation Report at 16. Moreover, fatal crashes on Indian reservation roads have *increased* by 52% over the past 25 years, while the national average has *decreased* by two percent over the same period. NHTSA Fatal Crashes at 11. Non-Indians as well as Indians are affected. In each of the years 1999-2002, one third of the on-reservation motor vehicle fatalities involved non-Indians. *See id.* at 3.

The highest rates of pedestrian injuries and deaths in the nation also occur on these roadways due to the "lack of sidewalks....posted speed limit signs, stop lights, [and] pedestrian warning signs." U.S Dep't of Transp., Pedestrian Safety in Native America, 7-8 (2004) (finding in 2001 that the age-adjusted pedestrian crash mortality rate is 3.9 per 100,000 population for Native Americans, while the national age-adjusted mortality rate is 1.68).[11]

In addition, the atrocious condition of IRR roads hinders the delivery of tribal governmental services, making travel for tribal members to health clinics, schools, employment centers and stores difficult, dangerous and, at times, impossible. *See* BIA Transportation Report at 14.

On the Navajo Nation Reservation, for example, more than three quarters of all roads are unpaved and many are completely impassable in poor weather.[12] Of the 173 bridges

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[11] U.S Dep't of Transp., Pedestrian Safety in Native America is available at <http://www.walkinginfo.org/pdf/FHWA/Ped_Safety_in_Native_America.pdf>

[12] *The Indian Reservation Roads Program, House Transp. and Infrastructure Comm., Subcomm. on Highways and Transit: Hearing on Federal Lands Highway Program*, 107th Cong. 5 (2002) [hereinafter *IRR Program Hearing*] (statement of Andrew Simpson, Navajo Nation).

on the Navajo Reservation, 51 are classified as deficient and pose safety hazards due to excessive wear. *Id.*

Travel to Navajo health clinics can involve trips over a hundred miles for some tribal members. "Dirt roads, deteriorating paved roads, and treacherous bridges make their journeys more difficult." *Id. at 3.* Emergency rescue and fire suppression crews are slowed by poor roads and at times cannot get their vehicles to the scene. *Id. at 2-3.* Police have greater difficulty patrolling and enforcing laws. *Id.*

Students spend inordinate amounts of time in school buses traveling dangerous and occasionally impassible roads. *See Bureau of Indian Affairs School Constr. Oversight Hearing Before Senate Comm. on Indian Affairs,* 105th Cong., 2 (1998) (statement of Thomas Atcitty, President, Navajo Nation) ("many children ride over fifty miles one way, with a number of stops to pick up other students.") Many of the school bus routes lack basic safety features, such as shoulders and guardrails. *See Proposals Hearing, supra* note 8, at 3 (statement of Joe Shirley, Jr. President, Navajo Nation). One school bus route on the Navajo Reservation includes a 12-mile stretch of one-lane dirt road. *Id.*

IRR road conditions likewise impede all types of reservation-based economic development. Tribal economic activities – tourism, agriculture, energy production, manufacturing, mineral extraction and timber harvesting – require moving people and goods. BIA Transportation Report at 2. Deteriorated roadways deter entry to the reservation, delay deliveries and add wear to vehicles.[13] Impassible roads

[13] *IRR Program Hearing, supra* note 12, at 1-2 (statement of James Garrigan, Director of Tribal Roads Program, Red Lake Band of Chippewa Indians).

stop commerce altogether.[14] As the Principal Chief of the Cherokee Nation Chadwick Smith has testified, "prospective investors are justifiably concerned that they will have to put up with third world type transportation infrastructure just to get their goods and services to market." *Id.*

Poor road maintenance conditions are compounded by geographic remoteness and the few access roads available. A Washington State Tribal Transportation Survey found that about a fourth of 29 tribes surveyed have only one access road. Three of those tribes surveyed reported chronic road closures. *See* Rick Galloway, Washington State Tribal Transportation Survey (2004) [circulating draft]. In one particularly vivid illustration of the problem, road conditions on the Tulalip Reservation just north of Seattle are so poor that in March 2005, the U.S. Postal Service suspended mail delivery "until the road situation can be resolved." Letter from U.S. Postal Service to Postal Customers of March 15, 2005. Tribal economic development, the effective delivery of tribal governmental services, and the safe and efficient transportation of tribal members and non-Indians alike cannot take place under such conditions.

[14] *IRR Program Hearing, supra* note 12, at 2 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

II. WHILE THE FEDERAL GOVERNMENT IS EXTENSIVELY INVOLVED IN IMPROVING AND MAINTAINING INDIAN RESERVATION ROADS, THE FUNDING LEVELS ARE FAR BELOW WHAT IS NECESSARY TO SUSTAIN A SAFE AND PRODUCTIVE ROADS SYSTEM

There are two major federal highway programs funded by the Federal Highway Trust Fund -- (1) the Interstate Highway Program and (2) the Federal-aid Highway Program (FHP). The FHP applies to all roads not covered by the Interstate Highway Program. Only the FHP is relevant here. As we shall see, the FHP includes as a subprogram the Indian Reservation Roads (IRR) Program.

Developing an effective national roads infrastructure has been a policy priority of the federal government since early in the 20th Century. By 1916, Congress had enacted a federal-aid roads program to provide funding to states to help them construct roads to meet federal design and construction standards. Pub. L. No. 64-156, ch. 241, 39 Stat. 355 (1916).

The 1916 federal-aid roads program set the course for federal-state cooperation in roads construction. Yet, it was the Federal Highway Act of 1956[15] and its companion legislation, the Highway Revenue Act of 1956[16] that gave this federal-state cooperative framework financial muscle. The Highway Revenue Act established the Federal Highway Trust Fund and dedicated federal fuel tax collections to highway and road improvements. The effect was to launch the construction of a system of highways that was extraordinarily successful.[17]

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[15] Pub. L. No. 84-627, ch. 462, 70 Stat. 374 (1956).
[16] 26 U.S.C. § 4041 note.
[17] Prior to 1956, gas tax receipts were directed to the General Fund of the U.S. Treasury. For a policy history of road and highway system development in the United States, *see* Richard L. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation, 60 Public Roads*, 1 (Summer 1996), *available at* <http://www.tfhrc.gov/pubrds/summer96/p96su2.htm>.

The Federal Highway Administration (FHWA) administers the program implementing the Federal-aid Highway Act (the Federal-aid Highway Program, FHP) pursuant to congressional authorization (generally every six years). These statutory authorizations apportion Federal Highway Trust Funds among the states. *See* 23 U.S.C. § 104(b). As existing sections of federally funded highways deteriorate, certain repair, reconstruction, and rehabilitation projects become eligible for federal funds. *See* 23 U.S.C. § 103(b)(6).

The Indian Reservation Roads (IRR) Program was established in 1928. 25 U.S.C. § 318a. The IRR Act authorized the Secretary of Agriculture (who had responsibility for federal roads at the time) to cooperate with state highway agencies and the Department of the Interior (DOI) to improve and maintain roads serving Indian lands. These IRR roads, however, were not eligible to receive Federal Highway Trust Funds until 1983. The enactment of the Surface Transportation Assistance Act (STAA)[18] that year made Federal Highway Trust Funds available for construction of roads within the IRR system. 23 U.S.C. § 204.

The IRR Program is administered jointly by the BIA and the FHWA. Its purpose is to provide:

> " . . . safe and adequate transportation and public road access to and within Indian reservations, Indian lands and communities for Indians and Alaska Natives, visitors,

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[18] Pub. L. No. 97-424, 96 Stat. 2097 (1983).

> recreational users, resource users and others, while contributing to economic development, self-determination and employment of Indians and Alaska Natives." Indian Reservation Roads Program, Final Rule, 69 Fed. Reg. 43,090 (July 19, 2004).

Since the STAA, tribes have become increasingly integrated into the Federal-aid Highways Program framework and have become participating governments in the system of federal-state-tribal cooperation.[19] Funding for the IRR Program, however, has lagged far behind where it should be, comparatively and absolutely.

As discussed in Section III, *supra*, there is an enormous and largely unmet need for transportation infrastructure on Indian reservation lands. Available data indicate that there is currently an estimated $11.8 billion backlog of improvement needs for BIA roads and $9.1 billion backlog for State and tribal roads. *See* BIA Transportation Report at 17.

In the history of the IRR program, reservation roads have not received the level of funding needed to improve their quality equivalent to non-Indian roads. Although reservation roads comprise nearly 3% of the Federal-aid Highway Program, less than 1% of Federal aid has been allocated to

[19] *See, e.g.*, 23 U.S.C. § 134 and § 135 (and implementing regulations at 23 C.F.R. Part 450) (requiring inclusion of tribal governments in metropolitan and state-wide transportation planning); 25 C.F.R. § 170.100-108 and 170.424 [69 Fed. Reg. 43,090, 43,107-108, 43,128] (tribal-state consultation for developing transportation improvement programs); 25 C.F.R. § 412-415 [69 Fed. Reg. 43,090, 43,127-128] (tribal-state and public involvement in long-range transportation planning); and 25 C.F.R. § 170.435-441 [69 Fed. Reg. 43,090, 43,129] (tribal governmental role in public hearing for roads development).

Indian roads.[20] If the IRR program were to receive the nearly 2.63% of funding that represents the percentage of Indian reservation road mileage in the federal highway system, the IRR program would have been fully funded at $4.7 billion from fiscal years 1998-2003. *Id.* The current IRR funding level, however, is authorized only at $1.6 billion for those fiscal years. *Id.*

At this funding level, the IRR Program receives only about half the amount per road mile that states receive. For instance, in 2001, the Transportation Equity Act for the 21st Century[21] (TEA-21) authorized payments of $38 billion for transportation programs, or $9,600 per state road mile, while the IRR program was allocated $275 million, or $4,900 per mile.[22] While the TEA-21 represented a funding increase for the IRR program, that increase amounted to less than 22 percent -- not even matching the cost of inflation over the six year authorization -- while funding to states increased forty percent for the same period.[23]

Considering IRR Program funds in the aggregate, moreover, does not describe how miniscule these funds may be once they are distributed among 562 federally recognized Indian tribes. The 2004 IRR Program Final Rule, which went

[20] U.S. Dep't of Transp., Federal Highway Administration, TEA-21, A Summary (1998).

[21] Pub. L. No. 105-178, 112 Stat. 107 (1998).

[22] *See* U.S. Dep't of Transp., Highway Statistics: 2001, Table FA-21, Federal Receipts and Disbursements for Highways (2002) [hereinafter DOT Highway Statistics]. Because the IRR system provides access to services for a substantial residential population, IRR system roads are more like state road systems than they are like roads of other federal agencies. *See* BIA Transportation Report at 9.

[23] *See* Richard Rolland & Dick Winchell, *State and Tribal Relations in Transportation in the Tribes and the States: Geographies of Inter-Governmental Interaction* 143 (Bays and Fouberg eds., 2002).

into effect in November 2004, established a funding distribution formula based on three factors pertinent to each tribe: the cost required to bring the tribe's existing IRR roads up to adequate standards; the number of vehicle miles traveled on these roads; and the size of the population served. *See* 25 C.F.R. § 170.200 [69 Fed. Reg. 43,090, 43,115]. Under this formula, many tribes receive allocations too small to even complete a single project.[24]

In addition, the lack of federal funds for the maintenance of IRR roads, as opposed to their construction, literally leaves many reservation roads "in the mud." Because Federal Highway Trust Funds may not be used for road maintenance, funding to maintain BIA roads on the IRR system is appropriated through annual Department of Interior Appropriations Acts. *See* BIA Transportation Report at 21. The BIA receives roughly $27 million annually for IRR maintenance. *Id.* at 22. However the BIA estimates that nearly five times the amount of funding currently available, or $120 million, is needed to adequately maintain BIA roads per year. *Id.* The road maintenance budget for the IRR program has in fact decreased in recent years from $30.5 million in 1990. *Id.*

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[24] The regulations provide a range of mechanisms to address the inadequacy of available funding. *See, e.g.*, 25 C.F.R. 170.205(a)(1) [69 Fed. Reg. 43,090, 43,116] (establishing a special high priority project funding pool for tribes whose annual allocation is insufficient to complete its highest priority project); § 170.300 [69 Fed. Reg. 43,090, 43,119] (IRR funds may be used to secure loans or repay debt financing instruments); § 170.301 [*Id.*] (IRR funds may be used as matching funds to leverage other federal, state, or local funds); § 170.302 [*Id.*] (allowing BIA regional offices to borrow IRR funds from each other to assist other BIA regional offices to finance the completion of an IRR project); and § 170.932 [69 Fed. Reg. 43,090, 43,141] (identifying alternative funding sources, including tribal fuel taxes and licensing and registration fees).

Tribal leaders have testified to Congress as to the inadequacy of roads program funding, with emphasis on the insufficiency of the BIA Maintenance Program to meet existing needs.[25] The BIA's allocation of maintenance funding is less than $1,000 per mile (compared to estimates of $4,000-$5,000 per mile used by states to maintain their non-IRR roads).[26] The 2004 Office of Management and Budget (OMB) Program Assessment Review Tool (PART) affirmed tribal concerns, finding that "the requested funding level [for road maintenance] is not based on local or national program needs and is inadequate to meet extensive maintenance backlogs." OMB PART at 141.[27] Moreover, the OMB study documented that BIA's federal partner in the IRR program, the FHWA, believes the BIA Maintenance Program fails to address the needs. *Id.* at 144.

In part to address these funding disparities, TEA-21 provided significant new terms to enhance tribal government participation in the IRR program so as to "render [federal] services more responsive to the needs" of Indian communities. 25 U.S.C. § 450a(a). TEA-21 clarified that Indian tribes may contract for and perform IRR Program activities pursuant to the Indian Self-Determination and Education Assistance Act.

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[25] See, e.g., *IRR Program Hearing, supra* note 12 (statement of Loretta Bullard, President, Kawerak, Inc.)(recommending increasing the BIA Maintenance Funding Program to $100 million); *Id.* (statement of Garrigan) (noting that inadequate funding has caused premature failure of many IRR system roads); *Id.* (statement of Simpson)(Navajo's road maintenance request funded at 30% of need).

[26] Among the most poorly maintained roads in Indian Country are neglected state roads that are part of the IRR system. *See, e.g.*, OMB PART at 142 (states ignore their responsibility to maintain state roads on and near Indian lands as required by 23 U.S.C. § 116(a)); *and* discussion in Section V below.

[27] The OMB PART for Indian Roads is available at <http://www.whitehouse.gov/omb/budget/fy2006/pma/interior.pdf>

25 U.S.C. § 450 *et seq.* (usually referred to as the Indian Self-Determination Act or ISDA). Although such contracting was available prior to enactment of TEA-21, since 1998 the percentage of IRR Program activities carried out by tribes has substantially increased.[28]

Indian tribes have contracted under the ISDA for such IRR Program activities as transportation planning, road and bridge design, and construction. Several Indian tribes, including the Cherokee Nation of Oklahoma and the Red Lake Band of Chippewa Indians in Minnesota, have entered self-governance agreements with the BIA to carry out the entire IRR Program.[29]

Reflecting the increasing tribal governmental role in transportation infrastructure activities, TEA-21 required extensive revision of the IRR Program regulations by a tribal-federal negotiated rulemaking committee. *See* 23 U.S.C. § 202(d)(2)(c). The IRR Program Final Rule, in addition to establishing a funding formula to distribute IRR Program funding among tribes, clarified procedures for transferring federal program functions to tribes under the ISDA, and set out the government-to-government planning framework for coordination between tribes and states.[30] Significantly, these

[28] *See* BIA Transportation Report, at 27. In 1998, 25% of IRR program functions were being implemented by tribes under ISDA agreements. By 2003, nearly half of all IRR program activities were being administered by tribes. *Id.*

[29] *See Proposals Hearing, supra,* note 8) (statement of Hamilton) (noting that ten tribes administer the IRR Program pursuant to self-government agreements).

[30] *See* 25 C.F.R. Part 170, Subpart C [69 Fed. Reg. 43,090, 43,115-126] (funding formula); 25 C.F.R. Part 170, Subpart E [69 Fed. Reg. 43,090, 43,133-137] (program service delivery under the ISDA); 25 C.F.R. §§ 170.100-108, 170.412-415, 170.424, 170.435-441 [69 Fed. Reg. 43,090,

regulations specifically identify tribal fuel taxes as an additional funding source for their tribal transportation programs. *See* 25 C.F.R. § 170.932(d) [69 Fed. Reg. at 43141].

While the federal IRR and BIA Road Maintenance Programs are critical for roads infrastructure on and near Indian lands, funding levels are not enough to achieve the program purposes. If tribal communities are to enjoy roads as safe and adequate as similar-class state roads, for the benefit of tribal economic development and self-government, tribal governments desperately need to rely on other sources of funding.

III. SOME TRIBES MUST SPEND MONEY ON STATE ROADS BECAUSE MANY STATES HAVE FAILED TO FULFILL THEIR LEGAL RESPONSIBILITIES TO FAIRLY ALLOCATE FEDERAL AND LOCAL FUNDS TO CONSTRUCT AND MAINTAIN INDIAN RESERVATION ROADS

Nationwide, much of the IRR system consists of state roads on and leading to Indian reservations.[31] Under the Federal-aid Highway Program, states have legal obligations with respect to the improvement and maintenance of these roads. *See* 23 U.S.C. § 204(c); 23 U.S.C. § 116(a). Typically, however, the states have not adequately fulfilled their responsibilities. *See* OMB PART at 139:

43,107-108, 43,127-128, 43,129] (tribal-state coordination and public involvement in transportation planning).

[31] *See* 69 Fed. Reg. 43,090 (2004) (stating that the IRR system is comprised of 25,000 miles of BIA and tribal roads, and 38,000 miles of state, county and local government roads).

> "States, counties and local governments constructed over 38,000 miles of roads on reservations using [highway trust funds] . . . [yet] local public entities do not maintain their roads/bridges."

The Federal-aid Highway Program requires states to allocate "a fair and equitable share" of their apportionment of federal highway trust funds for the construction and improvement of Indian reservation roads in their respective states. 23 U.S.C. § 204(c) (before a state may receive IRR Program funds for a state road, the Secretary of Transportation must determine that such IRR funding is "*supplementary to and not in lieu* of the [state's] obligation" to provide such funds from the state's allocation under 23 U.S.C. § 104) (emphasis added). By statute, the Secretary of Transportation is authorized to work with states and the Department of Interior to facilitate construction projects that fulfill this state obligation. *See* 23 U.S.C. § 120(f). Despite the states' statutory responsibilities and their eligibility for federal credits and financial off-sets when they allocate their funding to their IRR roads, *see* 23 U.S.C. § 204(d) (appropriations credited to state and local governments cooperating in the construction of IRR projects), *and* 23 U.S.C. § 120(b)(2) (adjusting the federal share payable to states to compensate for the percentage of non-taxable Indian land in the state), states rarely use their federally-allocated road funds for such Indian reservation roads. *See* OMB PART at 139, which reports:

> "[states] are refusing to use their HTF [highway trust fund] funding to reconstruct their roads/bridges when they have met their design life, forcing tribes to redirect their IRR HTF funding to reconstruct these roads/bridges."

States are also legally responsible for the maintenance of their roads constructed using Federal-aid Highway Program funds, including state-owned IRR roads. *See* 23 U.S.C. § 116(a) ("It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts"); *see also* 23 U.S.C. §116(c) (providing for the Secretary to withhold approval for further projects for failure of a state to maintain its roadways).

While use of the state's allocation of Federal Highway Trust funds for IRR roads construction is unusual, it is even more uncommon for states to dedicate their locally-generated revenues to maintain those roads – in spite of their legal responsibility to do so. *See, e.g., Oversight of the Indian Reservation Roads Program: Hearing Before Senate Comm. on Indian Affairs,* 106th Cong. (1999) (statement of Baracker) ("The lack of proper maintenance is becoming evident in the frequency of reconstruction activities because roads are deteriorating prematurely"); *and* OMB PART at 142 (although state IRR roads "are required to be maintained by law . . . BIA has no way to enforce [state compliance]").[32]

Because state performance of road improvement and maintenance responsibilities on their IRR roads has been substandard, tribes have been forced to use their limited tribally-generated resources to salvage those roads rather than to continue being faced with the hazards, closures and/or

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[32] The new IRR Program regulations provide terms for the BIA to implement 23 U.S.C. § 116(c), which call for the DOI to report state failures to maintain roads to FHWA. *See* 25 C.F.R. § 170.811 [69 Fed. Reg. 43,090, 43,138-139](triggering the provisions to permit the Secretary of Transportation to withhold approval of further projects to a state until the neglected road has been put into a proper condition).

inconveniences these roads pose.[33] Amicus Morongo Band of Mission Indians recently invested $1.3 million in tribal revenues in addition to nearly $500,000 in IRR Program funds to rebuild a network of neglected Riverside County roads on its reservation.[34] Bringing these roads up to standard required the Morongo Band to resurface, widen and install flood controls on these roads.[35] The PBPN, has likewise assumed responsibility for the maintenance of 55 additional miles of state roads within its reservation in the past decade. *See* Ramirez Aff., JA at 79, ¶ 2.

More generally, tribes, in the exercise of their governmental authority, have increasingly sought to address the dire roads situations on their reservations themselves. But, like other governments, tribes cannot fund the infrastructure projects necessary to provide safe and reliable transportation infrastructure for their citizens and those who choose to do business with them without adequate sources of funding.

Faced with inadequate federal funding and the abdication of responsibility by the states, tribes like the PBPN have accordingly levied motor fuel taxes, the proceeds of which they have dedicated entirely to road maintenance and improvements. In so acting, the tribes have done exactly what the federal and state governments do, and have acted in

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[33] LeRoy Gishi, BIA Division of Transportation, Comments at Northern Plains Tribal Technical Assistance Program Meeting (December 2004).

[34] *See* Mike Cruz, *Morongos Aim to Limit Entry*, San Bernadino County Sun, June 1, 2005.

[35] *Id.* Ironically, public use of these roads has increased dramatically since their reconstruction. Commuters and commercial traffic are now using these tribal roads to by-pass congested arteries on major thoroughfares. This new level of traffic is overburdening the design standards for these roads, causing the Tribe to consider mechanisms to deter traffic and preserve its road investment.

precisely the manner condoned by federal regulations. *See* 25 C.F.R. § 170.932(d) [69 Fed. Reg. at 43141].

Kansas, having chosen to neglect its own obligations with respect to reservation roads, would nullify this responsible exercise of tribal sovereignty. The state and its allies would deny the PBPN and other tribes the ability to raise any revenue to fund desperately needed roads projects. In doing so, they would strike at the heart of tribal sovereignty, impermissibly interfering with the ability of tribes to "raise revenues for ... essential services," *Merrion*, 455 U.S. at 137, and more broadly, with their ability to govern themselves. *See Bracker*, 448 U.S. at 142; and *Colville*, 447 U.S. at 186-187 (Rehnquist, J.). Their attack on the ability of tribes to act as responsible governments, contrary as it is to established doctrine, cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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July 14, 2005

ATTACHMENT A

INTERTRIBAL TRANSPORTATION ASSOCIATION MEMBERSHIP 2005

TRIBES & COMMUNITIES

1. Absentee Shawnee Tribe of Oklahoma
2. Apache Tribe of Oklahoma
3. Cherokee Nation
4. Citizen Band Potawatomi Tribe of Oklahoma
5. Comanche Tribe of Oklahoma
6. Confederated Salish & Kootenai Tribes
7. Confederated Tribes of the Warm Springs Reservation
8. Fort Belknap Indian Community (Gros Ventre & Assiniboine Tribes)
9. Jamestown S'Klallum Tribe
10. Kawerak, Inc. (Consortium of Native Villages in the Bering Straits Region)
11. Kaw Tribe of Oklahoma
12. Kootenai Tribe of Idaho
13. Navajo Nation
14. Nez Perce Tribe of Idaho
15. Shoshone-Bannock Tribes
16. Oneida Nation of Wisconsin
17. Prairie Band Potawatomi Tribe of Kansas
18. Salt River Pima-Maricopa Indian Community
19. San Ildefonso Pueblo
20. Arapaho Tribe & Eastern Shoshone Tribe of the Wind River Reservation
21. Southern Ute Tribe
22. Tanana Chiefs Conference
23. Village of Eyak

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No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

JOAN WAGNON, In her official capacity as Secretary Kansas Department of Re enue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL INTERTRIBAL TAX ALLIANCE, BAY MILLS INDIAN COMMUNITY, BIG PINE PAIUTE TRIBE, CHEYENNE RIVER SIOUX TRIBE, CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, HANNAHVILLE INDIAN COMMUNITY, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, LOWER BRULE SIOUX TRIBE, MASHANTUCKET PEQUOT TRIBAL NATION, NAVAJO NATION, NORTHERN ARAPAHO TRIBE, OSAGE NATION, PASCUA YAQUI TRIBE, POKAGON BAND OF POTAWATOMI INDIANS, ROSEBUD SIOUX TRIBE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND WALKER RIVER PAIUTE TRIBE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. Many States and Indian Tribes Have Entered Into Intergovernmental Cooperative Tax Agreements That Recognize and Affirm Their Respective Sovereign Interests	6
A. The State of Kansas Refuses To Work Cooperatively with the Kansas Tribes on Issues of Overlapping Jurisdictional Authority	9
B. The Experience of the Navajo Nation is Instructive of the Tremendous Advantages of State-Tribal Cooperative Agreements	10
C. In a New Era of Cooperation, South Dakota and the Sioux Tribes Have Entered Into Tax Agreements That Create Efficiency and Ensure Predictability	14
D. This Court's Decision in *Oklahoma Tax Commission v. Chickasaw Nation* Provided a Prime Opportunity for the State of Oklahoma and its Indian Tribes To Work Together To Resolve Their Tax Disputes	18
E. After Years of Negotiation, the State of Michigan and its Tribes Have Developed A Uniform Tax Agreement Which Provides Both Predictability and Flexibility	23
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Nevada v. Hicks, 533 U.S. 353 (2001) 7, 9

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 18, 19, 20, 21

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TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

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TABLE OF AUTHORITIES – Continued

Page

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MISCELLANEOUS

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TABLE OF AUTHORITIES – Continued

Page

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Intergovernmental Agreement Between Arizona Department of Transportation and Navajo Tax Commission 12

Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the California State Board of Equalization 12

TABLE OF AUTHORITIES – Continued

Page

Tax Agreement Between the Bay Mills Indian Community and the State of Michigan 24

Tax Agreement Between the Hannahville Indian Community and the State of Michigan 24

Tax Agreement Between the Little River Band of Ottawa Indians and the State of Michigan 24

Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan 24

Tax Agreement Between the Pokagon Band of Potawatomi Indians of Michigan and the State of Michigan 24

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Motor Fuels Contract Between the State of Oklahoma and the Seneca-Cayuga Tribe of Oklahoma 23

TABLE OF AUTHORITIES – Continued

Page

Tax Collection Agreement Between the Cheyenne River Sioux Tribe and the South Dakota Department of Revenue and Regulation and the State of South Dakota 17

Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and Texas Comptroller of Public Accounts 12

Intergovernmental Agreement Between State Tax Commission of Utah and Office of the Navajo Tax Commission 12

BRIEF FOR *AMICI CURIAE* NATIONAL INTERTRIBAL TAX ALLIANCE AND INDIVIDUAL INDIAN TRIBES IN SUPPORT OF RESPONDENT

Many tribes and states are discovering ways to set aside jurisdictional debate in favor of cooperative government-to-government relationships that respect the autonomy of both governments. Tribal governments, state governments and local governments are finding innovative ways to work together to carry out their governmental functions. New intergovernmental institutions have been developed in many states, and state-tribal cooperative agreements on a broad range of issues are becoming commonplace.

National Conference of State Legislatures, National Congress of American Indians, Government to Government: Understanding State and Tribal Governments 2 (2000)

INTEREST OF *AMICI CURIAE*[1]

The National Intertribal Tax Alliance (NITA) was formed in 2001 for the purpose of enhancing and strengthening tribal governments through education on issues related to tribal taxation and economic development. NITA is a non-profit organization dedicated to promoting the development and implementation of tribal laws, procedures and administration relating to tribal taxation and to assisting Indian tribes in exercising their inherent power to levy, impose, collect and utilize tribal tax revenues.

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[1] No one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

The individual *amici* Tribes represent a cross-section of Tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations and histories. All *amici* share a sense of outrage at the primary argument in Petitioner's brief that this Court should abandon the doctrine of *stare decisis* and should set aside the applicable balancing of interests test as unworkable. *Amici* have a strong interest in protecting tribal sovereignty, in securing tribal self-sufficiency and in ensuring that the numerous intergovernmental tax agreements between states and Indian tribes are not undermined by the present litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas seeks to impose its motor fuel tax on gasoline sold by the Praire Band Potawatomi Nation ("Tribe") at a tribally-owned gas station located on the Reservation (the "Station"). The Tribe already imposes a tribal tax on the retail sale of motor fuel on the Reservation that is approximately the same rate as the state tax and the price of fuel at the Nation Station (including the tribal tax) is set at fair market price. Boursaw Aff. ¶ 2.A (J.A. 69-70). It is undisputed that it would be impossible for both the state and tribal taxes to be imposed. The expert testimony accepted by the lower courts concluded that "the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Station] fuel business to virtually zero." Pflaum Rep. § 3.2 (J.A. 44).

Prior to 1995, the State of Kansas did not collect the state tax on motor fuel distributed to Indian lands based on the fact that Kansas law expressly placed the legal incidence on fuel retailers (such as the Station). During

this time, the State worked cooperatively with the Kansas Tribes, recognizing "the duty of each to negotiate with the other on a government-to-government basis pursuant to [the] national Indian policy of economic, social and political self-determination for Indian tribes." *See* Tax Compact Between the Prairie Band Potawatomi Indians and the State of Kansas (set forth in J.A. 20-26). But in 1995, Kansas amended its Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997), in order to shift the legal incidence of the tax to fuel distributors. *See* Kan. Stat. Ann. § 79-3408(b). After which the State abruptly terminated the Tax Compacts with the Kansas Tribes and litigation shortly ensued.

Applying the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Tenth Circuit properly concluded that under the particular facts of this case, the state tax "interferes with and is incompatible with strong tribal and federal interest against taxation." J.A. 144. The Tenth Circuit correctly found that the state tax, although nominally involving a fuel distributor off-reservation, infringed upon the on-reservation activities of the Tribe. J.A. 139. Under *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980), state taxes may not be imposed where revenues burdened by the tax are derived from "value generated on the reservation by activities involving the Tribe."

In this litigation, the State of Kansas has taken an unreasonable and untenable position, asking this Court to abandon the doctrine of *stare decisis* and to set aside the balancing of interests test set forth in *Bracker*. However, the balancing test allows the courts to appropriately assess the sovereign interests of the state against the sovereign

interests of the tribe and the federal government.[2] This balancing of the interests test has provided a longstanding, workable framework under which hundreds of intergovernmental cooperative agreements have been negotiated between states and Indian tribes for the past 25 years. Petitioner wrongly suggests to the Court that the balancing of the interests test has proven "unworkable" and that it must be replaced with a bright-line test – an express preemption requirement and a formalistic legal incidence test – under which Petitioner gets everything and Indian Tribes get nothing.

The only reason the balancing test is "unworkable" is due to Petitioner's unwillingness to negotiate cooperative tax agreements with the Kansas Tribes and its present reliance on litigation to resolve disputes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 518 (1991), the Court endorsed the balancing of interests test and recognized that states have alternative mechanisms available to them in lieu of

[2] The federal interest is evident in the regulatory framework established by the Federal-aid Highway Program which is designed to harness the complementary contributions of the various governmental entities, including tribal governments, involved in the planning, designing, financing, constructing, monitoring and maintaining the nation's road systems. *See, e.g.,* 23 C.F.R. § 450.210(a). In addition, the Federal Highway Administration ("FHWA") works with tribal and state transportation departments to establish inter-governmental transportation agreements to "combine their efforts with available resources in a coherent inter-governmental partnership that result in more efficient, improved and beneficial transportation services to Indian and non-Indian neighbors residing, working or traveling in each of the party's governmental jurisdictions." *See* Government to Government Accord By and Among the Federal Highway Administration (Minnesota Division), the Minnesota DOT and eleven tribes in Minnesota, § III (2002), *available at* http://www.dot.state.mn.us/mntribes/accord02.doc.

litigation, including the ability to "enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."

As this brief explains, over the years, partly in reliance on the guidance provided by this Court, Indian tribes have worked cooperatively with their respective state governments to develop mutually respectful relationships and to avoid disputes by resolving their differences over taxation authority through the use of state-tribal tax compacts. In fact, many state governments recognize that tribal governments have a legitimate interest in collecting taxes, in particular, motor fuel taxes to pay for the construction and maintenance of reservation roads, bridges and other transportation infrastructure.[3] The story of the Navajo Nation, and its cooperative tax agreements with five states (Arizona, New Mexico, Utah, California and Texas), is particularly instructive. In addition, this brief provides an overview of the longstanding, oftentimes difficult, relationships between three other States – South Dakota, Oklahoma and Michigan – and the Indian tribes located within their borders who have worked hard to establish a "mutually satisfactory regime" for the collection and distribution of motor fuel taxes.[4]

[3] For example, the State of New Mexico has adopted legislation which provides a deduction for gallons sold on Indian reservations in computing the New Mexico gasoline tax due where an Indian tribe assesses a tribal gas tax. N.M. Stat. Ann. § 7-13-4 (1999).

[4] Inexplicably, contrary to the course of action taken by their respective state legislatures in authorizing and approving state-tribal tax compacts, the attorney general of South Dakota, in coordination with the attorney generals of New Mexico, Oklahoma, Michigan and Utah has prepared and filed an *amicus* brief in support of the State of Kansas.

Many states and Indian tribes have made great strides towards improving intergovernmental relations despite their history of conflict and animosity. State-tribal tax compacts are but one example of the types of intergovernmental cooperative agreements in place throughout Indian country. State and tribal governments have dedicated substantial time and resources to find practical, on-the-ground solutions to complex legal questions involving their overlapping jurisdictional authority in several subject matter areas. The result sought by Petitioner has the potential to undermine all of these cooperative agreements, leading to more, not less, litigation.

ARGUMENT

I. Many States and Indian Tribes Have Entered Into Intergovernmental Cooperative Tax Agreements That Recognize and Affirm Their Respective Sovereign Interests.

A core attribute of tribal sovereignty is the Tribes' power to tax – the ability to raise revenues essential to fulfilling their role as sovereign governments. *Colville,* 447 U.S. at 152 ("power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty"). In Indian country, tribal governments are principally responsible for the construction and maintenance of reservation roads, bridges and other transportation infrastructure. In order to fulfill these responsibilities and accommodate the competing interests of two sovereigns, Indian tribes have worked cooperatively with their respective state governments on a sovereign-to-sovereign basis.

Intergovernmental cooperative agreements have been deemed a "device of necessity" which acknowledge and

preserve the sovereignty of each respective government. *See* David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government,* 1 REV. CONST. STUD. 120, 121 (1993); American Indian Law Center, Handbook State-Tribal Relations (1981), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. Following the guidance provided by this Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi,* tribal and state governments have worked together cooperatively, have avoided costly litigation, and have entered into numerous compacts and agreements that clearly demarcate their respective authority over a variety of subject areas, including tax administration, land use and zoning, natural resource management and law enforcement.

Intergovernmental cooperative agreements have distinct advantages, including the ability to offer flexibility in accommodating local needs; the opportunity to address the ambiguity inherent in overlapping jurisdictional authority; and the capacity to provide comprehensive resolution to complex questions of law. In fact, several states have recognized these distinct advantages and have adopted legislation authorizing state agencies to enter into cooperative agreements with Indian tribes. *See Nevada v. Hicks,* 533 U.S. 353, 393 (2001) (O'Connor, J. concurring) citing Mont.Code Ann. § 18-11-101 *et seq.* (1997) (State-Tribal Cooperative Agreements Act);[5] Neb. Rev. Stat. § 13-1502 *et seq.* (1997)

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[5] In *The Tribal Nations of Montana: a Handbook for Legislators* (1995), the State of Montana recognized its long history of cooperation with Indian tribes:

> In 1981, in recognition of the government-to-government relationship and to promote cooperation, the Legislature enacted

(Continued on following page)

(State-Tribal Cooperative Agreements Act);[6] Okla. Stat., tit. 74 § 1221 (Supp. 2001) (authorizing Governor to enter into cooperative agreements on behalf of the State to address issues of mutual interest).[7] *Also see* Ariz. Rev. Stat. § 11-952 (authorizes Arizona state agencies to enter cooperative agreements with Tribes) and Ariz. Rev. Stat. § 28-401 (specifically authorizes Arizona Department of Transportation to enter into fuel tax compacts with Tribes).

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chapter 11, part 1, MCA) that authorizes public agencies, including cities, counties, school districts, and other agencies or departments of the state, to enter into cooperative agreements with Montana's tribal governments. To date, over 500 agreements, relating to a variety of governmental services, have been negotiated and completed."

Id. at 14, *available at* http://www.leg.state.mt.us/content/committees/interim/2001_2002/st_trib_rel/handbook.pdf. In the motor fuel tax context, Montana and the Tribes agree that the purposes of the agreement "are to avoid legal controversy and possible litigation over the taxation of gasoline [on the Reservation], to avoid dual taxation of gasoline by both the Tribes and the State, and to ensure that the same level of taxation is imposed on the distribution of gasoline both within and outside the boundaries of the Reservation." *See* Fort Peck-Montana Gasoline Tax Agreement at 1, *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

[6] In Nebraska, the State has entered into motor fuel tax compacts, indicating its view that "cooperation and negotiation between the [State] and the [Tribes] is more productive and beneficial to the State and the citizens of the State. . . . " *See* Agreement For the Collection and Dissemination of Motor Fuels Taxes Between the State of Nebraska and the Winnebago Tribe of Nebraska at 1, *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

[7] *See infra*, Part I.D. In addition, many other states are working with tribes to adopt intergovernmental transportation agreements for tribal-state collaboration in their roads programs. For further information, *see* Federal Highway Administration, State Programs, *available at* http://www.fhwa.dot.gov/hep/tribaltrans/state.htm (providing details on tribal-state activities in Wisconsin, Minnesota, California, Washington, New Mexico, Iowa and Montana).

A. The State of Kansas Refuses To Work Cooperatively with the Kansas Tribes on Issues of Overlapping Jurisdictional Authority.

The State of Kansas wrongly suggests to the Court that the balancing of the interests test has proven "unworkable" and that it must be replaced with a bright-line test under which petitioner gets everything and Indian tribes get nothing. The only aspect of the balancing test that has proven "unworkable" is petitioner's reliance on litigation to resolve disputes arising from overlapping jurisdictional authority which, in turn, stems from its unwillingness to negotiate cooperative tax agreements with Indian tribes.

As recognized by Chief Justice Rehnquist, on behalf of a unanimous Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi*, state governments have alternative mechanisms available to them in lieu of litigation, including the ability to "enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." 498 U.S. at 518. Further, the Court held that, although a state could require Indian retailers to collect state imposed taxes on certain sales to non-members, tribal sovereign immunity precluded States from suing Tribes to collect the taxes. *Id.*

At least partly in reliance on this Court's suggestion in *Citizen Band Potawatomi*, hundreds of state-tribal agreements, covering a broad range of topics, have been negotiated in good faith during the past 15 years – evidence of a strong commitment on the part of Indian tribes, as well as a number of States, to address issues of mutual concern through cooperation, not confrontation. *See Nevada v. Hicks*, 533 U.S. at 393 (O'Connor, J. concurring) ("there are a host of cooperative agreements between

tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement"); David H. Getches, *et al.*, Federal Indian Law at 619-20 (4th ed. 1998); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage,* 112 HARV. L. REV. 922, 930 (1999) ("Negotiated compacts reduce intergovernmental tensions and encourage cooperation that transcends historical prejudices. . . . a welcome change from the historically bitter condition of relations between tribes and states.").

Unfortunately, petitioner is no longer committed to working cooperatively with Indian tribes located within the State of Kansas, and instead resorts to a zero sum game strategy. At one point in time, Kansas did enter into state-tribal tax agreements, clearly recognizing that tribal governments provide significant programs and services to their communities – communities consisting of both Indians and non-Indians. *See, supra* at 3. Petitioner's current self-serving position in this case ignores the relevance and practicality of intergovernmental cooperative agreements. Unlike litigation, these voluntary arrangements are the preferred mechanism – and at times the only mechanism – to accommodate the competing interests of two sovereigns.

B. The Experience of the Navajo Nation is Instructive of the Tremendous Advantages of State-Tribal Cooperative Agreements.

In the motor fuels tax context, a unique example of coordination and cooperation is the agreements between the Navajo Nation and five States – Arizona, New Mexico, Utah, California and Texas. The Navajo Nation is the largest Indian tribe in the nation, both in population and land area. The Navajo Nation's territory spans 25,000

square miles in the southwestern United States, with reservation lands located in portions of Arizona, New Mexico and Utah. The 2000 Census shows the population of the Navajo Nation as 180,462 with more than 96 percent Native American. Navajo Nation Division of Economic Development, *Navajo Nation Data from U.S. Census 2000* 1 (2001).

Like all tribal governments, the Navajo Nation funds a broad range of programs and activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, road construction and maintenance, legislative and judicial services. The primary revenue sources of general funding for these essential governmental services are royalties from mineral resource development and taxes. The Office of the Navajo Tax Commission administers seven taxes, including the Possessory Interest Tax, the Business Activity Tax, the Oil and Gas Severance Tax, the Hotel Occupancy Tax, the Tobacco Products Tax, the Sales Tax and the Fuel Excise Tax. Navajo Nation Code tit. 24 §§ 101-923.

The Navajo Nation Fuel Excise Tax went into effect on October 1, 1999. The fuel tax revenues are deposited into the Navajo Nation Road Fund. The Navajo Nation Road Fund is dedicated to road development, maintenance and construction. Navajo Nation Code tit. 12 § 1002. The Navajo Nation imposes a tax of 18 cents per gallon on gasoline and diesel fuel. Navajo Nation Code tit. 24 §§ 903-05. The tax is imposed on the privilege of distributing or retailing any amount of fuel within the Navajo Nation. Navajo Nation Code tit. 24 § 903. There are 29 registered distributors and 69 registered retail fuel locations operating or located on the Navajo Nation. The Navajo Nation

currently collects approximately $12,000,000 annually in fuel excise taxes.

In an attempt to efficiently and effectively administer the Navajo Fuel Excise Tax, the Navajo Nation has voluntarily and respectfully engaged in extensive interaction with neighboring states. This cooperation has focused on the coordination of tax administration activities and the sharing of information on a regular basis.[8] In all, the Navajo Nation has entered into agreements with five states – Arizona, New Mexico, Utah, Texas and California.[9]

The Navajo Nation and the several States understand that there is a shared interest in the prevention of unlawful use or sale of untaxed fuel. These intergovernmental

[8] One recent example of these cooperative efforts is the work of the Governor's Gasoline Tax Working Group in the State of New Mexico. In an effort to provide a forum for in-depth analysis of the gasoline tax issue and to allow various stakeholders to express their concerns, Governor Richardson appointed individuals with working knowledge of the tax issues from state government, tribal governments and the gasoline industry. In 2003, this group met, discussed, studied and analyzed the issues. In August, 2003 this group made recommendations on improving the fuel tax reporting system in the State of New Mexico. *See* Report and Recommendations By the Governor's Gasoline Tax Working Group (August 12, 2003).

[9] *See* Intergovernmental Agreement between Arizona Department of Transportation and Navajo Tax Commission (May 7, 1999); Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the California State Board of Equalization (November 13, 2001); Amended Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (March 9, 2004); Agreement on Exchange of Information Between the Office of the Navajo Tax Commission and the Texas Comptroller of Public Accounts (February 7, 2001); and the Intergovernmental Agreement between the State Tax Commission of Utah and Office of the Navajo Tax Commission (October 16, 2000), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

fuel-tax agreements were entered into to foster the coordination of tax compliance efforts amongst the various taxing jurisdictions. Based on the agreements, the States and the Navajo Nation can effectively and efficiently administer the collection of the applicable fuel excise taxes and may share tax information. These agreements also allow for joint audits of fuel distributors and retailers. Under the agreement with the State of Utah, the Governor of Utah and the President of the Navajo Nation have agreed to communicate annually regarding plans for addressing the infrastructure deficit on the Utah portion of the Navajo Nation.

By entering into these cooperative agreements, the Navajo Nation realized an opportunity to more fully develop its own tax program. The Navajo Nation has long recognized that a serious infrastructure deficit exists within the Navajo Nation compared to similar non-Indian rural areas. The lack of adequate roads is one factor which impedes economic development within the Navajo Nation. The Navajo Nation Department of Transportation has determined the cost of the current and future road needs for the next twenty years to be nearly $4.5 billion. This need is quadruple the funding levels provided under the Indian Reservation Roads program as authorized by the Federal Lands Highway Program. *See* Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, 112 Stat. 107 (June 6, 1998); Navajo Nation Department of Transportation, *Navajo Nation Long Range Comprehensive Transportation Plan*, chap. VI-3 (2003). Thus, the Navajo Nation faces a deficit of more than $3 billion to meet the current and future needs of the Navajo road system.

In an effort to provide more funds to defray the cost of the development, construction and maintenance of

transportation projects on the Navajo Nation, the Navajo Nation Road Fund was established. This fund is entirely dependent on the revenues generated from Navajo fuel excise taxes. The States of New Mexico and Utah statutorily allow a deduction for gallons or a credit for fuel excise taxes paid to the Navajo Nation. N.M. Stat. Ann. § 7-13-4(E), 4.4 (1999); Utah Code Ann. § 59-13-201(9) (2004). The intergovernmental agreement with the State of Arizona provides for a tax sharing arrangement which allocates a percentage of the fuel excise tax revenues between the State and the Navajo Nation.

These statutory provisions and agreements allow for the fuel distributed and sold on the Navajo Nation to bear a similar tax burden as the fuel sold outside the Navajo Nation. The agreements avoid a dual taxation problem that would most certainly make the cost of fuel on the Navajo Nation extremely more expensive because of the layering of the state taxes on top of the Navajo Nation fuel tax. This accord allows the Navajo Nation to defray a portion of the cost of road development, construction and maintenance on the Navajo Nation. Navajo Nation Code tit. 12 § 1002. Any change in the law to allow states to impose taxes on fuel sales on the Navajo Nation would have a very serious detrimental impact, crippling the Navajo Nation's ability to construct and maintain roads throughout on its lands.

C. In a New Era of Cooperation, South Dakota and the Sioux Tribes Have Entered Into Tax Agreements That Create Efficiency and Ensure Predictability.

The nine Sioux Tribes in South Dakota are among the poorest in the U.S. and have a long and difficult history, maintaining constant vigilance to protect their inherent

sovereign authority from incursions by the State of South Dakota. In South Dakota, one of the earliest intergovernmental tax compacts arose on January 1, 1971 between the State and the Oglala Sioux Nation. Under the terms of this tax compact, the Tribe authorized the State Department of Revenue to administer the collection of certain taxes within the Pine Ridge Indian Reservation and the State sent 83% of the tax collected back to the Tribe.

In 1974, based on the ease and convenience created by this early tax compact, the State Legislature passed SDCL 10-12A, codifying the authority of the State Department of Revenue to enter into tax compacts with all Indian tribes in South Dakota. Without explanation, in the late 1980's, the State refused to negotiate any more agreements with the Sioux Tribes. The late Governor Mickelson and his administration obstinately opposed any attempt to engage in fair dealings by litigating each and every tax issue they could. Similar to the present actions by the State of Kansas, South Dakota would single out a Tribe and seek to strip away their power to tax. This invasion of Tribal tax authority initiated by the State soured Tribal-State relations in South Dakota, and no new tax agreements were made during the period. This strategy of protracted and expensive litigation often left the Sioux Tribes in an inferior negotiating position,[10] until the federal courts

[10] The uneven negotiating position that Tribes in South Dakota suffer from is exacerbated by the lack of resources and the poverty of the Sioux Reservations in South Dakota. *See* U.S. Dept. of Commerce, Bureau of the Census, *The 100 Poorest Counties in the United States*, CPH-L-184 (1990). According to the 2000 Census, Ziebach County and Dewey County, which are within the Cheyenne River Sioux Reservation, have poverty rates of 49.9% and 33.6% respectively. U.S. Census Bureau, 2000 Census of Housing and Population, *Summary Social, Economic, and Housing Characteristics*, PHC-2-43, South Dakota.

upheld their inherent sovereign authority. *See, e.g., South Dakota v. U.S. and Cheyenne River Sioux Tribe*, 105 F.3d 1552 (8th Cir. 1997), *cert. denied*, 522 U.S. 981 (1997), *on remand*, 102 F.Supp.2d 1166 (D.S.D. 2000) (striking down state motor vehicle tax as applied to tribal members residing on their reservations).

In spite of these difficulties, a new era of cooperation and negotiation has arrived in South Dakota. When Governor Rounds took office in January 2003, the State once again began to seriously discuss intergovernmental tax agreements with the Sioux Tribes.[11] On March 24, 2003, the State Legislature passed several amendments to SDCL 10-12A of the South Dakota Code.[12] There were two substantive changes made. First, the State Legislature repealed all language relinquishing the State's claims of jurisdiction over Indians within Indian reservations in relation to five categories of state tax.[13] Second, the State enumerated seven categories of state taxes that the State

[11] Unfortunately, the South Dakota Attorney General's Office continues a strategy of litigation before negotiation and agreement. *See South Dakota v. Mineta*, 278 F.Supp.2d 1025 (D.S.D. 2003) (Tribal Employment Rights Tax paid by private contractors); *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003) reh'g denied (Apr 01, 2003), reh'g granted in part (Apr 02, 2003), Opinion Vacated in Part on Rehearing, 674 N.W.2d 314, 2004 SD 3 (S.D. 2004), *cert. denied*, 541 U.S. 1064 (2004) (motor fuel tax).

[12] Not coincidentally, on February, 26, 2003, the South Dakota Supreme Court had ruled that the Hayden-Cartwright Act does not provide congressional authorization for States to levy fuel taxes within Indian reservations. *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d at 403.

[13] The five categories of state tax are: a retail sales and service tax; a use tax; a cigarette tax; a contractors' excise tax; and an alternate contractors' excise tax.

could include in a tax agreement with a Tribe, including motor fuel taxes.[14]

Significantly, since 2003 the State has entered into Tax Collection Agreements with the four largest tribes in South Dakota: the Cheyenne River Sioux Tribe, the Oglala Sioux Nation, the Rosebud Sioux Tribe, and the Standing Rock Sioux Tribe.[15] Generally, these Tax Collection Agreements provide mechanisms to administer the collection of taxes to the benefit of both the State and the Tribe. Under these agreements, the Tribe agrees to impose a tribal tax that is uniform with the state tax, easing the ability of individual merchants and the State to collect the tax while addressing any unfair competitive advantage. *See, e.g.*, Tax Collection Agreement between the Cheyenne River

[14] The amendment allowed the State to add two additional tax categories: a motor vehicle excise tax and a fuel excise tax. In February 2005, three more tax categories were added, bringing the total to ten taxes that can be mutually agreed upon.

[15] The provisions of each Tax Collection Agreement are similar in substance. *See* Tax Collection Agreement between the Cheyenne River Sioux Tribe and the South Dakota Department of Revenue and Regulation and the State of South Dakota (September 29, 2003), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. This agreement provided a cooperative mechanism for collection of certain taxes within the exterior boundaries of the Cheyenne River Sioux Reservation which contains 2.8 million acres (roughly the size and shape of the State of Connecticut). The agreement covers many areas of taxation, including a retail sales and service tax, a use tax, a contractors' excise tax, an alternate contractors' excise tax, a cigarette tax, and a fuel excise tax. There are several terms in this agreement which ensure that these taxes can be collected fairly without causing any disadvantages to either the State or the Tribe. The tax agreement expedites information sharing between the State and the Tribe while also protecting the confidential information of individuals, such as tax return, tax liability, or personal income information.

Sioux Tribe and the South Dakota Department of Revenue and Regulation and the State of South Dakota, at 4-6.

The Tax Collection Agreements are extremely beneficial to the State, creating an efficient and economical tax collection system on the Reservations. The agreements do impose a hardship on many tribal members who live in poverty and have great difficulty in paying the higher tax rates mandated in the agreements. However, the tax agreements are beneficial to the tribal governments by helping raise much needed revenue to assist in financing numerous initiatives, including the construction, maintenance and improvement of tribal roads throughout the Reservations.

If the Supreme Court rules in favor of Kansas and sets aside the balancing of interests test in favor of a bright-line rule, South Dakota will have no incentive to enter into future, or to honor current, Tax Collection Agreements. Under such a ruling, South Dakota could not only circumvent the existing agreements with respect to the motor fuel taxes (*vis-à-vis* imposing the tax on the distributor), but by legislative fiat could circumvent the agreements in relation to the other state taxes by imposing the "legal incidence" of a tax upstream, off-Reservation (*e.g.*, wholesalers of food, clothing, etc.).

D. This Court's Decision in *Oklahoma Tax Commission v. Chickasaw Nation* Provided a Prime Opportunity for the State of Oklahoma and its Indian Tribes To Work Together To Resolve Their Tax Disputes.

The existing relationship between the State of Oklahoma and the thirty-seven federally-recognized Indian tribes located within its borders is based on the unique

history of the State and the development of federal laws applicable to Indian affairs within the State. *See* Brad A. Bays, *Tribal State Tobacco Compacts and Motor Fuel Contracts in Oklahoma* in THE TRIBES AND THE STATES: GEOGRAPHIES OF INTERGOVERNMENTAL INTERACTION, 181, 182-86 (Brad A. Bays and Erin Hogan Fouberg, Rowman & Littlefield Publishers, Inc. 2002). The number of tribal governments located in Oklahoma, along with significant federal legislation directed specifically to Indian affairs in Oklahoma, has made coordination and cooperation between the sovereign governments a formidable task.

The legal relationship between Oklahoma and the tribes located in Oklahoma has been complicated at times and has led to litigation concerning the scope of authority between the sovereign governments. Indeed, several of the precedent-setting taxation cases decided by this Court in the last fifteen years are a result of challenges asserted by Oklahoma Tribes against various forms of state taxation within a tribe's Indian country.[16] *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (motor fuels tax); *Oklahoma Tax Commission v. Sac & Fox*, 508 U.S. 114 (1993) (motor vehicle excise tax and registration fees); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (tobacco tax). Despite these conflicts, the State and the Oklahoma Tribes have been able to resolve certain differences through government-to-government negotiations

[16] Although the Osage Tribe is the only tribe in Oklahoma with its historical reservation boundaries intact (making up the entire Osage County, Oklahoma), the Indian country lands for the other tribal governments are in the form of tribal trust land and allotments and are scattered throughout numerous counties within the jurisdictional boundaries for each respective tribe.

and agreements that are continuing to benefit both parties while respecting each other's sovereign rights.

State and tribal leaders have not always agreed, especially on those issues that significantly offend the sovereign status of the governmental entity in conducting its affairs. One such contentious issue involved the sale of motor fuels by the Oklahoma Tribes in their Indian country. First, the State had an administrative concern in relation to their ability to efficiently collect the state tax from the sale of motor fuel by tribal retailers. Second, the State had a political concern that without a uniform tax rate, the Tribes (with their lands scattered in both rural and high traffic areas) would have an unfair competitive advantage over non-Indian retailers and convenience store operators.

In the late 1980s, the State attempted to impose the state motor fuel tax on retail sales by the Chickasaw Nation which owned and operated two convenience stores located on tribal trust land.[17] The Tribe objected on the basis that under Oklahoma law the motor fuel tax was imposed on the retailer and, as such, were illegal direct taxes on the Tribe. When no resolution was reached, the Tribe filed suit against the state in federal court which was eventually resolved by this Court in *Oklahoma Tax Commission v. Chickasaw Nation.* In *Chickasaw,* the Court held that Oklahoma could not impose its motor fuel tax on the Tribe based on the fact that the legal incidence of the motor fuel tax was placed on the Tribe as a retailer. As tribes continued to expand and establish more retail

[17] The jurisdictional authority of the Chickasaw Nation includes more than 7,648 square miles in south-central Oklahoma and encompasses all or part of thirteen counties.

fuel stations, the *Chickasaw* decision presented a prime opportunity for the State and the Oklahoma Tribes to work together, sovereign-to-sovereign, in an effort to find a comprehensive solution to many of the issues left unresolved by the courts.

In 1996, following substantial deliberation, the Oklahoma Legislature modified its Motor Fuel Tax Code to provide authority for the State to enter into Motor Fuels Contracts with the Oklahoma Tribes as a compromise on the collection of taxes on tribal sales of motor fuels to non-Indians. Okla. Stat. tit. 68 § 500.1 *et seq.*[18] This legislation was a compromise for both sides, but it created a frame-work under which an efficient tax collection system was established in Indian country with the Oklahoma

[18] The legislative findings of the Motor Fuel Tax Code amendments provide that:

> It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts as set forth in subsection B of this section, for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts under which the Indian tribes are in part compensated for any tribal motor fuel tax revenues the Indian tribes might lose by reason of the adoption and enforcement of this act. Such mutually beneficial agreements allow both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country. Okla. Stat. tit. 68 § 500.63(A)(4).

In the words of the Oklahoma state courts, the purpose of the legislation is not to create an indebted relationship between the Tribes and the State, but to create a "joint action between two sovereigns." *See Ryals v. Keating*, 2 P.3d 378 (Okla. Ct. App. 1999) (upholding motor fuel contract legislation as valid under the Oklahoma Constitution).

Tribes receiving a substantial portion of the motor fuel taxes. In addition, the legislation addressed the State's concern that tribal retailers could undercut off-Reservation retailers.[19] Both the State and the Oklahoma Tribes who entered into Motor Fuels Contracts would benefit by avoiding costly litigation in relation to further efforts to enforce the collection of state motor fuel taxes. The Tribes would be able to focus their resources in their efforts to expand their business enterprises in a predictable legal climate.

The ability of a state government and a tribal government to reach a compromise is no easy task. In Oklahoma, intergovernmental cooperative agreements between the State and the Tribes, including the Motor Fuels Contracts, were a result of many years of negotiation based on key decisions by state and federal courts. As of February 2004, thirty-three of the thirty-seven federally-recognized tribes in Oklahoma have entered into motor fuels tax compacts with the State.[20] The benefits of the

[19] "Across the United States, the primary issue of contention between tribal and state governments is not so much the fact that many tribes successfully evade state fuel excise taxes. The real issue is that tribes have at times used their sovereign status – particularly the fact that they are immune from civil actions – to undercut off-reservation retailers." Bays, *Tribal State Tobacco Compacts and Motor Fuel Contracts in Oklahoma* at 192.

[20] The State of Oklahoma has entered into motor fuel tax contracts with thirty-three Indian tribes: Chickasaw Nation/State of Oklahoma (09/26/96); Cherokee Nation/State of Oklahoma (09/26/96); Choctaw Nation/State of Oklahoma (09/30/96); Ottawa Tribe/State of Oklahoma (06/25/97); Peoria Tribe/State of Oklahoma (10/08/97); Muscogee (Creek) Nation/State of Oklahoma (10/08/97); Seminole Nation/State of Oklahoma (10/08/97); Miami Nation/State of Oklahoma (10/08/97); Modoc Tribe/State of Oklahoma (10/08/97); Ponca Nation/State of Oklahoma (03/30/98); Kialegee Tribal Town/State of Oklahoma (06/01/98); Eastern Shawnee Tribe/State of Oklahoma (06/01/98); Cheyenne-Arapaho

(Continued on following page)

cooperative working relationship attained through these contracts go beyond the motor fuels tax context, as the relationship evolves to face other areas of overlapping jurisdictional authority. A decision by this Court in favor of the State of Kansas, which chooses a course of litigation, will seriously undermine the hard-won success reached in Oklahoma through cooperation and compromise.

E. After Years of Negotiation, the State of Michigan and its Tribes Have Developed A Uniform Tax Agreement Which Provides Both Predictability and Flexibility.

On December 20, 2002, the State of Michigan and eight of the twelve federally recognized Indian tribes of Michigan successfully concluded negotiations and signed uniform tax agreements (collectively referred to as the

Tribes/State of Oklahoma (09/03/98); Wichita & Affiliated Tribes/State of Oklahoma (09/30/98); Thlopthlocco Tribal Town/State of Oklahoma (12/17/98); Delaware Tribe of Indians/State of Oklahoma (12/29/98); Pawnee Tribe of Oklahoma/State of Oklahoma (03/10/99); Sac & Fox Nation/State of Oklahoma (04/21/99); United Keetoowah Band of Cherokees/State of Oklahoma (09/30/99); Comanche Nation/State of Oklahoma (03/31/00); Tonkawa Tribe/State of Oklahoma (03/31/00); Otoe-Missouria Tribe/State of Oklahoma (04/03/00); Apache Tribe/State of Oklahoma (05/08/00); Alabama Quassarte Tribal Town/State of Oklahoma (06/14/00); Absentee Shawnee Tribe/State of Oklahoma (08/15/00); Caddo Tribe/State of Oklahoma (09/13/00); Kaw Nation/State of Oklahoma (01/02/01); Quapaw Tribe of Oklahoma/State of Oklahoma (01/02/01); Kickapoo Tribe of Oklahoma/State of Oklahoma (03/30/01); Delaware Nation/State of Oklahoma (10/02/01); Shawnee Tribe/State of Oklahoma (09/09/02); Kiowa Tribe/State of Oklahoma (12/03/03); Seneca-Cayuga/State of Oklahoma (02/10/04), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. Information regarding the Oklahoma-Tribal Motor Fuel Tax Agreements, *available at* http://www.state.ok.us/~oiac/StateTribal.htm.

"Uniform Tax Agreement").[21] The Uniform Tax Agreement was the result of nearly three years of intense negotiations among the Michigan Tribes themselves, and between the State and the Tribes.[22] The Uniform Tax Agreement is comprehensive and covers six categories of state taxes: (1) sales tax;[23] (2) use tax;[24] (3) individual income tax;[25] (4) motor fuel tax;[26] (5) cigarette tax;[27] and (6) single business tax.[28]

Intergovernmental tax agreements between the State and the Michigan Tribes are not a recent development.

[21] All twelve federally recognized Indian tribes in Michigan negotiated with the State. Thus far, eight Michigan Tribes have signed the Uniform Tax Agreement. *See* Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Little River Band of Ottawa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Pokagon Band of Potawatomi Indians of Michigan and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Hannahville Indian Community and the State of Michigan (Dec. 20, 2002), *available at* http://www.michigan.gov/cis/0,1607,7-121-1748_23287---,00.html.

[22] For a fuller discussion of the negotiations in Michigan, *see* Thomas J. Kenny, Paul W. Shagen and Marjorie B. Gell, *Negotiation of Tax Compacts for Developing Standards of State Taxation in Indian Country*, STATE TAX NOTES 471 (Feb. 14, 2005); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004).

[23] MCL § 205.52(1), *et seq*.

[24] MCL § 205.92(1), *et seq*.

[25] MCL § 206.51(1), *et seq*.

[26] MCL § 207.1104(j).

[27] MCL § 205.421, *et seq*.

[28] MCL § 208.31, *et seq*.

Since the 1970s, the State has entered into tax agreements on a tribe-by-tribe basis, covering a variety of state taxes, including the individual income tax, motor fuel tax and cigarettes tax. Although this approach resulted in tax agreements with certain Michigan Tribes, it failed to adequately address state taxation within Indian country, resulted in inconsistent tax treatment and imposed administrative burdens on the State. Beginning in 1995, the State indicated that it would no longer enter into tax agreements with different provisions.

Instead, the State sought to develop a single uniform tax agreement. With this in mind, the State and the Bay Mills Indian Community ("Bay Mills") entered into a tax agreement on January 1, 1997. The Bay Mills tax agreement addressed application of the Michigan sales tax, use tax, cigarette tax, gasoline tax, diesel fuel tax, individual income tax and single business tax to Bay Mills and its members. On the heels of what was deemed to be a successful round of negotiations with Bay Mills, the state subsequently revoked the existing tax agreements with other Michigan Tribes, insisting that they sign tax agreements identical to the one executed with Bay Mills. However, the State had underestimated the uniqueness and autonomy of each Michigan Tribe. Since the other tribes did not participate in the negotiations, they refused to enter into any such uniform tax agreement. As a result, the State chose to terminate the Bay Mills tax agreement, at which point there was uncertainty as to whether new tax negotiations would commence.

However, it was clear that the State still recognized the value of negotiating tax agreements on a more comprehensive scale. In March 1997, Michigan's Department of Treasury issued a report recommending that the State

begin negotiating a uniform and comprehensive tax agreement with the Michigan Tribes. The report, which in part was an attempt to provide certainty to the taxability of activities in Indian country, concluded:

> Negotiating "tax treaties" which would define the privileges, exemptions and obligations of both tribes and state governments may represent a rewarding means of resolving these issues . . . [T]he State of Michigan has successfully used state-tribal agreements in the past. Many states, such as New York and Michigan, are continuing to expand such agreements.[29]

The tribal chairpersons from the Michigan Tribes (the "Michigan Council") met March 16, 2000 to discuss issues of mutual concern, including the State's desire to enter into a uniform tax agreement. The Michigan Council pledged that not a single Indian tribe would "enter into any uniform tribal-state tax agreement proposed by the State of Michigan, [but rather collectively the tribes would] formulate a position on state taxation which embodies their common interests, and yet recognizes the need to accommodate their individual sovereign interests."[30] After nearly a year of inter-tribal negotiations, the Michigan Tribes finalized a compromise proposal to submit to the State.

On June 27, 2001, the Michigan Tribes and the State commenced negotiations with monthly meetings, which usually lasted two to three days and involved significant

[29] Office of Revenue and Tax Analysis, Michigan Department of Treasury, *Taxation of American Indians in Michigan* (March 1997). The State of Michigan in its report stated that it sought to bring certainty to an area in which "[t]he unique status of American Indians has created confusion regarding the taxable status of many activities."

[30] Resolution No. 00-2, Michigan Council (2000).

travel and expense, clearly demonstrating their commitment to finalizing and formalizing a Uniform Tax Agreement. During negotiations, the parties developed unique solutions to difficult issues,[31] while relying upon well-established federal Indian law. Consistent with the principles established by this Court, the parties utilized the doctrine of federal preemption, and the attendant balancing analysis, to assess their respective rights.

This was particularly true with respect to nonmember exemptions from sales tax for transactions within Indian country.[32] For example, the legal incidence of the Michigan sales tax is upon the retailer.[33] The Michigan Tribes asserted that the sales tax does not apply to Indian country sales by nonmember retailers to the Michigan Tribes or their members as it is preempted under the balancing preemption analysis. While the state disagreed with the Michigan Tribes, the parties ultimately agreed to extend a sales tax exemption to both tribal and tribal member purchases with certain restrictions.[34]

Unlike past tax negotiations, which generally involved the State and a single tribe, the State and all of the Michigan Tribes cooperated to finalize the Uniform Tax Agreement, which has resulted in improved, cooperative

[31] The tax agreement proposed by the Michigan Tribes, and submitted to the State, reflected their interpretation of the tax immunities secured under federal Indian law. While their proposal formed the starting point for the negotiations, the parties almost immediately moved away from it. The ensuing negotiations focused on developing an agreement that both reflected and departed from established principles of federal Indian law.

[32] Tax Agreement, Section III. A.

[33] *See* MCL § 205.52(1).

[34] Tax Agreement, Section III. A. 1. b. and III. A. 2., 3., 4., 5., and 7.

relationships. It represents arms-length negotiations in which the parties worked to resolve their differences through creative solutions while being mindful of the legal parameters established by the Court. Any significant change in the fundamental legal principles upon which the tax agreement is based would undermine the entire process.[35]

The current Uniform Tax Agreement is working well. It brought predictability to a disputed area. While there have been disagreements regarding interpretation of the Uniform Tax Agreement, the parties anticipated this and agreed to attend an annual summit to discuss their differences and agreed to a dispute resolution process that

[35] For example, the purpose and intent of the Tax Agreement reflect the parties' effort to bring predictability to an uncertain disputed area, stating:

> By entering into this Agreement the State and the Tribe indicate their intention and willingness to be bound by its terms so long as this Agreement is in effect. While this Agreement is in effect between the Tribe and the State it is agreed that: (i) their respective rights will be determined by this Agreement with respect to the taxes that are the subject of this Agreement, (ii) neither party will seek additional entitlement or seek to deny entitlement on any federal ground (including federal preemption) whether statutorily provided for or otherwise with respect to the taxes that are the subject of this Agreement, (iii) neither party will contest the legality of the Agreement or the legal authority of any of its provisions, and (iv) both parties will defend this Agreement from attack by third parties.

While this statement indicates that neither party will seek or deny entitlement based upon any federal ground during the period the Tax Agreement is in effect, a significant change in federal law may motivate the state to terminate the agreement and seek payment of additional taxes. The State of Michigan has joined the *amicus* brief prepared and filed by the State of South Dakota in support of the State of Kansas in this case.

includes binding arbitration.[36] Moreover, the success of the Uniform Tax Agreement is reflected in the fact that, to date, neither the State nor any Michigan Tribe has exercised its right to terminate the arrangement.[37]

However, a significant change in federal law would upset the Uniform Tax Agreement and would result in protracted disputes in the area of taxation and in other areas. In the absence of the balancing preemption analysis, the state undoubtedly would seize the opportunity to attempt to apply other laws to the Michigan Tribes, their members and nonmembers within Indian country. Such action would be contrary to the longstanding, workable framework, which involves balancing the respective interests of the parties.

CONCLUSION

Many States and Tribes have achieved great success in improving intergovernmental relations by finding practical, on-the-ground solutions. Through cooperation and the use of intergovernmental agreements, states and tribes have been able to accommodate local needs while addressing the ambiguities inherent in overlapping jurisdictional authority. The result sought by Petitioner will undermine the numerous state-tribal tax compacts, which in turn, will lead to more, not less litigation. The decision of the court of appeals should be affirmed.

[36] *Id.* at Section I. F. 1.

[37] Although the Uniform Tax Agreement has an indefinite term, either party may terminate the agreement with at least 90 days' written notice after two years from the effective date. Since two years have passed, either party may now exercise this right, but instead have elected to continue to be bound by the negotiated arrangement.

Respectfully submitted,

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In The Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICI CURIAE BRIEF OF THE SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS IN SUPPORT OF RESPONDENT PRAIRIE BAND POTAWATOMI NATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. The State's Abandonment of the Tax Compacts Weighs in Favor of the Federal/Tribal Interests	4
II. The State's Violation of the Kansas Act for Admission Also Weighs in Favor of the Federal/Tribal Interests	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Bryan v. Itasca County, 426 U.S. 373 (1976) 12

In the Application for Tax Exemption of Nina Kaul, 261 Kan. 755 (1997) 10

Kaul v. State Dep't of Revenue, 266 Kan. 464 (1998) 10

McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) 9

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Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 4

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Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000) 7, 8

The Kansas Indians, 72 U.S. 737 (1866) 10

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) 9, 12

United States v. Kagama, 118 U.S. 375 (1886) 2

Ward v. Race Horse, 163 U.S. 504 (1896) 10

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

12 Stat. 127, ch. 20, § 1 (1861) 3, 8

Kan. Stat. Ann. § 79-3408(c) 11

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INTEREST OF *AMICI CURIAE*

In addition to the Prairie Band Potawatomi Nation, the State of Kansas includes three other federally recognized Indian tribes within its borders: (1) The Sac and Fox Nation of Missouri in Kansas and Nebraska, (2) the Iowa Tribe of Kansas and Nebraska, and (3) the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. As with the Prairie Band, these other three resident Kansas tribes also operate small retail gasoline stations within their Indian country. These other resident Kansas tribes share the Prairie Band's concern for the encroachment by the State of Kansas on their sovereign rights as tribal governments. These other resident Kansas tribes submit this brief in support of Respondent Prairie Band Potawatomi Nation.[1]

SUMMARY OF ARGUMENT

In Indian tax cases, as this Court well knows, a state may only impose a tax whose legal incidence falls on a non-Indian if the balance of federal, state, and tribal interests favors the State and federal law is not to the contrary. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). The Tenth Circuit correctly balanced these interests in finding for the Prairie Band. In addition to interests raised in the briefs filed by and in support of the Prairie Band, the other three resident

[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

Kansas tribes file this brief to highlight two Kansas-specific factors also favoring the Prairie Band in the balancing test.

First, the interest of the State of Kansas is weak and not longstanding with respect to motor fuel taxes that impact the ability of a tribe to impose its own tax. In the early 1990s, the State of Kansas entered tax compacts with each of the four resident tribes. Under the compacts, the State of Kansas agreed to forgo certain excise taxes – including motor fuel taxes – so long as the tribes imposed a comparable tax. These tax compacts were consistent with the State's broader policy of respecting the sovereignty of other governments and avoiding double taxation of motor fuels.[2] Over the objections of the resident Kansas tribes, the State abruptly changed course in 1995, essentially reneged on the compacts, and sought to impose state motor fuel taxes on tribal commerce. The State's relatively recent change in course and disregard for previously recognized tribal taxing power and tribal sovereignty over

[2] These compacts may have also reflected the State's effort to make amends for decades of hostility toward and mistreatment of the resident Indian tribes. Up until then, the State of Kansas had consistently acted on what it perceived "as the best interest of its citizenry and economy, even when such actions undermine[d] tribal sovereignty and self-determination." *See* Melissa A. Rinehart and Kate A. Berry, *Kansas and the Exodus of the Miami Tribe*, ch. 2, p. 45 from *The Tribes and the States: Geographies of Intergovernmental Interaction*, edited by Brad A. Bays and Erin Hogan Fouberg (Rowman & Littlefield Publishers, Inc. 2002) (discussing the history of exploitation and mistreatment of Indian tribes by the State of Kansas). These tax compacts may have been an attempt to remedy some of that past misbehavior. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies.")

tribal commerce weighs in favor of the federal/tribal interests.

Second, the Federal Government has a particularly strong interest favoring the Prairie Band as reflected in the Kansas Act for Admission. That federal statute prohibits the State of Kansas from construing its boundaries to "impair the rights of person or property now pertaining to the Indians of said territory" so long as those rights remain unextinguished by federal treaty. *See* 12 Stat. 127, ch. 20, § 1 (1861). While the right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development have not been extinguished by treaty, they have been impaired by the State of Kansas construing its boundaries to include the Prairie Band Potawatomi Nation. The intent of this federal statute was to protect those rights from infringement by the State. But for the State of Kansas treating the Prairie Band as being located within the State's boundaries for tax purposes, the Prairie Band would be considered outside the boundaries and eligible for the state tax exemption for out-of-state deliveries.

In violating the Kansas Act for Admission, the State has effectively nullified the Prairie Band's power to impose its own tax on gasoline sales by a tribally owned, on-reservation gas station. The impairment of tribal rights in violation of the Kansas Act for Admission also weighs in favor of the federal/tribal interests. This Court should affirm the Tenth Circuit based on the balancing test.

ARGUMENT

I. The State's Abandonment of the Tax Compacts Weighs in Favor of the Federal/Tribal Interests

Contrary to positions now taken in its merit brief, the State of Kansas once recognized the sovereignty of the resident Kansas tribes and the inability of the State to impose a motor fuel tax on tribal commerce. In tax compacts entered in the early 1990s, the State relinquished any jurisdiction it may have had to levy and collect excise taxes on tribal commerce so long as the tribes imposed a tax. The State now takes the opposite position. The State's relatively recent change in course and disregard for previously recognized tribal taxing power and tribal sovereignty over tribal commerce reflect a weak State interest.

In 1991, the State of Kansas and the resident Kansas tribes opened negotiations over imposition and collection of state taxes. "Several Indian tribes in Kansas [had] been selling gasoline without collecting or remitting" the state sales tax. Stacy L. Cook, Comment, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members – States Have a Right Without a Remedy*, 31 Washburn L.J. 130, 138 n.72 (1991). After this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), "[s]tate officials immediately entered into negotiations with the four Indian tribes of Kansas." Cook at 138 n.72. The Attorney General for Kansas "wanted to allow the tribes to levy their own taxes, as long as those taxes were only a few cents lower than the state tax." *Id.* Ultimately, the Governor of the State of Kansas entered into tax compacts in which the State would forgo its taxation authority over sales on reservation provided the tribes continued to levy

at least as much tax as they had been imposing on fuel and other items. *See* Tax Compact Between the Sac and Fox Nation of Missouri in Kansas and Nebraska and the Kansas Department of Revenue; Tax Compact Between the Iowa Tribe of Kansas and Nebraska and the Kansas Department of Revenue; Tax Compact Between the Kickapoo Nation and the Kansas Department of Revenue; Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas (attached hereto as Appendix A).

The State of Kansas recognized that the resident Kansas tribes provided significant services and programs funded by tribal taxes that benefitted both tribal and non-tribal persons. These programs and services included construction of roads and bridges on or near the respective reservations, operation of tribal justice systems, operation of substance abuse treatment centers, maintenance of water plants and distribution systems, operation of volunteer fire departments, operation of low-income housing programs, operation of schools, operation of community heritage centers, operation of food distribution programs, and a host of other programs and services benefitting Indians and non-Indians alike in the rural communities in which the tribes resided. *See* Appendix A.

In fact, these tribes still operate many of these and other government programs and functions funded, in part, by tribal motor fuel tax revenue. For example, the Sac and Fox Nation maintains about 33 miles of its own roads and bridges within the Sac and Fox Indian Reservation funded in part with motor fuel tax revenue. The Sac and Fox Nation spends in excess of $50,000 a year of its money to maintain these roads and bridges. The Sac and Fox Nation also uses its fuel tax revenue to support tribal education, housing, police, fire, and capital improvements. The Iowa

Tribe maintains 32.7 miles of its roads (plus other roads) within its reservation at a cost in excess of $180,000 per year. The Iowa Tribe also has its own police force and fire department. The Kickapoo Tribe has built and maintains about 41.5 miles of road within its reservation and also uses fuel tax revenue to support a police department and fire department. Just like states, these resident Kansas tribes (along with the other Indian tribes across the nation) depend on their ability to tax to fund government functions and services that benefit both members and non-members.

In the tax compacts, the State of Kansas also recognized that if the resident Kansas tribes did not fund and operate these programs, the State would likely be forced to offer such programs at its expense. Therefore, the State agreed to refrain from taxing certain transactions so long as the tribes imposed tribal taxes on those same transactions.[3] The resident Kansas tribes would then be able to raise revenue through taxation with which to fund these programs and services (saving the State of Kansas from having to fund these programs itself). The parties viewed this compromise as a fair and equitable way "to eliminate problems which result from tribal and state taxation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on reservations

[3] The Prairie Band, for example, agreed to impose a tribal tax not less than 60% of the state rate. *See* Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas at 2. The tribal taxes helped ease the concern raised by this Court that tribes might "market an exemption from state taxation to persons who would normally do their business elsewhere" if no state tax was imposed. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

and those off reservations." *See* Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas at 2.

While the tax compacts initially worked well, the State of Kansas abruptly changed course in 1995 and essentially reneged on the compacts. The State amended its motor vehicle fuel taxing scheme and announced its intention to impose its motor fuel taxes on fuel deliveries to Indian reservations within Kansas. *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 569 (10th Cir. 2000). That change led to this litigation.

As evidenced by the cost of the ongoing litigation between the State of Kansas and the Prairie Band, a renewal of the tax compacts entered between the State and the resident Kansas tribes would have been the best resolution. The State's recent reversal of its position recognizing tribal sovereignty and the right of tribes to tax tribal commerce shows just how weak the State interest is in now taxing the tribal commerce at issue. The State's abandonment of the tax compacts weighs in favor of the federal/tribal interests.[4]

[4] The nominal amount of money at issue for the State further highlights the weakness of the State's interest. The potential fuel tax revenues the State of Kansas seeks from the Prairie Band totals only about 0.09% of the state motor fuel taxes collected in 1999 – an extremely small sum.

II. The State's Violation of the Kansas Act for Admission Also Weighs in Favor of the Federal/ Tribal Interests

The Federal Government has a particularly strong interest favoring the Prairie Band as reflected in the Kansas Act for Admission. That federal law prohibits the State of Kansas from construing its boundaries to "impair the rights of person or property now pertaining to the Indians of said territory" so long as those rights remain unextinguished by federal treaty. *See* 12 Stat. 127, ch. 20, § 1 (1861). Despite this limitation, the State of Kansas has construed its boundaries to physically include the Prairie Band Potawatomi Nation for tax purposes. But for the Prairie Band being located within the boundaries of Kansas for tax purposes, the Prairie Band would be considered outside the boundaries and eligible to avail itself of a state tax exemption for the exportation of motor vehicle fuel outside the boundaries of Kansas.

Pursuant to the first proviso of Section 1 of the Kansas Act for Admission into the Union:

> [N]othing contained in the said constitution respecting the boundary of [Kansas] shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians. . . .

12 Stat. 127 (1861).[5] Congress required these "disclaimer" clauses to be included in some of the territorial acts,

[5] While the Tenth Circuit in an earlier decision did address Section 1 of the Kansas Act for Admission, it did not address this first proviso. *See Pierce*, 213 F.3d at 576-77. Instead, it examined the second proviso

(Continued on following page)

enabling acts, and constitutions of states "to assure both tribes and the federal government that the territory/state [would] never, without federal consent and/or a treaty modification, interfere with the internal affairs of tribal nations." David E. Wilkins, *Tribal-State Affairs: American States as "Disclaiming" Sovereigns*, ch. 1, p. 2 from The Tribes and the States: Geographies of Intergovernmental Interaction (Rowman & Littlefield Publishers, Inc. 2002). These "disclaimer" clauses "recognized the general principle that Indian territories were beyond the legislative and judicial jurisdiction of state governments." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 142 (1984).[6]

"The first enabling act containing an explicit disclaimer clause was the act authorizing Kansas to be admitted to the Union in 1861." Wilkins at 12. "This measure reflected congressional intent to abide by preexisting treaties with Kansas tribes and to remind states of federal supremacy in the field of Indian policy." *Id.* Through these "disclaimer" clauses, the "Indians continued thereafter, as previously, in possession of the lands, and their rights,

which provides that nothing in the constitution will be construed "to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; . . . " The Tenth Circuit did not address the impairment of Indian rights.

[6] While this Court had indicated that a disclaimer of right and title by a state may have only been a disclaimer of proprietary rather than governmental interest, *see Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962), this Court later clarified that disclaimers could not have been only proprietary because there would then have been no need for Congress to enact Public Law 280 allowing states to assume jurisdiction over reservation Indians. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 177-78 (1973).

whatever their nature and extent. . . ." *Missouri, K. & T. Ry. Co. v. Roberts*, 152 U.S. 114, 120 (1894). "Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired. . . ." *The Kansas Indians*, 72 U.S. 737, 756 (1866). In later discussing *The Kansas Indians* case, this Court stated:

> In the cases of the Kansas Indians, 5 Wall. 737, we held that a state, when admitted into the Union, was bound to respect an exemption from taxation which it had previously granted to tribes of Indians within its borders, because, as the court said, the state of Kansas 'accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or voluntary abandonment of their tribal organization.'

Ward v. Race Horse, 163 U.S. 504, 519 (1896). This Court has construed the first proviso of Section 1 of the Act for Admission to prohibit the impairment of Indian rights.[7]

[7] The Kansas Supreme Court made a similar finding in 1997 by stating:

> Under the 1861 Act for Admission of Kansas into the Union, no personal or property rights that Indians possessed before the State of Kansas was admitted into the Union, or before the Territory of Kansas was organized, can be impaired unless such rights are extinguished by treaty between the United States and the Indians. . . .

In the Application for Tax Exemption of Nina Kaul, 261 Kan. 755, 770 (1997). The next year, though, the Kansas Supreme Court again reviewed the first proviso of Section 1 and upheld the denial of the state fuel tax exemption for deliveries to Indian reservations for individual retailers. *See Kaul v. State Dep't of Revenue*, 266 Kan. 464, 477-78 (1998). In contrast to the case before this Court, the *Kaul* case did not

(Continued on following page)

These "rights" protected by the Act for Admission include the Prairie Band's right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development. The actions of the State of Kansas impair these rights. The Prairie Band cannot continue to sell motor vehicle fuel if both the state and tribal taxes are imposed. The price of motor vehicle fuel will be too high and customers will simply go to non-tribal competitors (who do not pay the double tax). Imposition of the state tax effectively nullifies the Prairie Band's power to impose its own motor fuel tax (and use that tax revenue to pay for roads, bridges, and the like on the Prairie Band Reservation).

These actions also deprive the Prairie Band of a tax exemption under state law. The State of Kansas taxes the "distributor of the first receipt" of motor fuel in Kansas (as opposed to an importer or manufacturer). Kan. Stat. Ann. § 79-3408(c). However, the State of Kansas exempts from taxation a distributor who exports motor vehicle fuel from Kansas to a state, territory, or foreign country outside the boundaries of Kansas:

> No tax is hereby imposed upon or with respect to . . . [t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

Kan. Stat. Ann. § 79-3408(d)(1). But for the state boundary being construed as including the resident Kansas tribes within the State of Kansas for tax purposes, the resident

involve the impairment of tribal rights because no tribal governmental interest was involved.

Kansas tribes would be considered outside the State of Kansas for export purposes and able to use this tax exemption. The loss of this state exemption due to inclusion within the State's boundaries for tax purposes impairs the Prairie Band's right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development contrary to a reasonable reading of the first proviso of Section 1 of the Act for Admission.[8]

The State of Kansas has acted in violation of the Act for Admission. Because the Kansas Act for Admission precludes the State of Kansas from impairing the rights of the Prairie Band to self-governance and self-determination, the Federal Government has a strong interest which favors the Prairie Band in the balancing of federal, state, and tribal interests.

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[8] To the extent that language in the Kansas Act for Admission may be regarded as ambiguous, "it is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes*, 467 U.S. at 149. Therefore, any ambiguities in the Kansas Act for Admission should be construed in favor of the Prairie Band. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

THOMAS WEATHERS*
ALEXANDER, BERKEY, WILLIAMS & WEATHERS LLP
Attorney for the Sac and Fox Nation of Missouri in Kansas and Nebraska

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Counsel of Record

APPENDIX A

TAX COMPACT BETWEEN THE SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA AND THE KANSAS DEPARTMENT OF REVENUE

This Agreement is made and entered into this 3rd day of January, 1992 by and between the Sac and Fox Nation of Missouri in Kansas and Nebraska (hereinafter referred to as the Sac and Fox Nation) and Department of Revenue of the State of Kansas (hereinafter referred to as the "Department").

WHEREAS, the Sac and Fox Nation exists in a treaty relationship with the United States of America; and

WHEREAS, President Bush on June 14, 1991, issued an American Indian policy statement which reaffirmed the government-to-government relationship between Indian Nation tribes and the Federal Government; and

WHEREAS, Sac and Fox Nation Self-Determination must be based on economic Self-Sufficiency; and

WHEREAS, it is agreed by and between the Sac and Fox Nation and Department that it is mutually beneficial to the parties to cooperate in matters relating to taxation; and

WHEREAS, the Legislature of the State of Kansas has authorized tax collection agreements between the Sac and Fox Nation and Department to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction; and

WHEREAS, the Sac and Fox Nation has enacted tribal government tax laws and is currently collecting

taxes on sales of the following: general merchandise, cigarettes, tobacco products, motor fuels and special fuels; and

WHEREAS, the Sac and Fox Nation provides programs and services which are funded in part from existing tribal taxes which programs and services include the following:

(1) Operation and maintenance of the "Trad-N-Post" smokeshop benefiting both tribal and non-tribal members.

(2) Operation of a Community and Heritage Center benefiting both tribal and non-tribal members.

(3) Construction and maintenance of roadways and bridges benefiting both tribal and non-tribal members.

(4) Maintenance of an independent and tribally-operated water plant and distribution system benefiting both tribal and non-tribal members.

(5) Operation of the Sac and Fox Nation Community Health Representative Transportation Program benefiting both tribal and non-tribal members.

(6) Operation of a Low Income Housing Program benefiting both tribal and non-tribal members.

(7) Operation of educational scholarship programs for tribal members.

(8) Operation of health care assistance programs for tribal members.

(9) Operation of the Sac and Fox nation Alcohol and Substance Abuse Program benefiting both tribal and non-tribal members.

WHEREAS, if many of the above-mentioned programs and services were not provided by the Sac and Fox Nation, Kansas would very likely be called upon to fund and provide the programs and services; and

WHEREAS, the geographic location of the Sac and Fox Nation Reservation is such that it is believed that businesses operated on the Reservation do not compete directly with businesses operated by merchants in surrounding areas and communities.

NOW, THEREFORE, the parties agree as follows:

1. *Definition of Terms.* As used in this agreement, the following terms shall mean the following:

a. "Sac and Fox Nation" means the Sac and Fox Nation of Missouri in Kansas and Nebraska, an Indian tribe recognized by the Congress of the United States of America.

b. "Reservation" means those areas subject to tribal jurisdiction ("Indian Country") as defined by 18 U.S.C. Section 1151.

c. "Excise Tax" means those taxes imposed by the state of Kansas on retail sales (K.S.A. 79-3601 et seq.); cigarettes (K.S.A. 79-3301 et seq.); motor fuels (K.S.A. 79-3401 et seq.); special fuels (K.S.A. 79-3474 et seq.) and tobacco products (K.S.A. 79-3370 et seq.).

2. No excise tax of Kansas or its governmental subdivisions shall be imposed on any transaction occurring on the Sac and Fox Nation Reservation so long as such transaction is subject to a Sac and Fox Nation tax (the "Tribal Tax") imposed thereon which is no less than the following tax amounts:

a.	Motor and Special Fuels	$.04/gal.
b.	Cigarette and Tobacco Products	$.07/pkg.
c.	General Sales	2%
d.	Construction Projects	3.5%

3. A fully executed copy of the enacting resolution of the governing body of the Sac and Fox Nation imposing any such "Tribal Tax" shall be filed with the Department of Revenue.

4. The State of Kansas hereby relinquishes any jurisdiction it and its governmental subdivisions may have to levy and collect Excise Taxes on sales by the Nation or by Merchants on the Sac and Fox Nation Reservation subject to the following conditions:

a. Such merchants are authorized by the Sac and Fox Nation to do business on the Reservation;

b. Such merchants are paying Tribal Taxes to the Sac and Fox Nation;

c. Such excise taxes imposed by the Sac and Fox Nation shall not be less than those specified in Paragraph 2 of this Compact.

5. The Sac and Fox Nation agrees to diligently pursue collection of any Tribal Tax imposed on merchants transacting business on the Reservation.

6. The Sac and Fox Nation agrees to certify on forms provided by the Department that it is collecting the taxes set forth in Paragraph 2. Upon request by the Department, the Sac and Fox Nation shall provide supporting certification documentation at the Department's offices not more than twice a year.

7. In no event shall this Compact be construed to be a waiver of the sovereignty of the Sac and Fox nation or a concession that the State of Kansas has any jurisdiction whatsoever on the Sac and Fox Nation Reservation.

9. This Compact shall be null and void and of no further force or effect if the Congress of the United States or the United States Supreme Court declares that states may not impose excise taxes on transactions involving non-Indians occurring on Indian reservations.

10. This Compact shall be for a term of five (5) years from the effective date hereof, and shall continue until either party seeks modification of the Compact. In that event, either party shall notify the other in writing of such modifications and the parties shall have 180 days to arrive at a mutually agreeable modified compact.

11. This Compact shall be binding and effective only after it has been approved by the Sac and Fox Nation Tribal Council, the Governor, and the Kansas Secretary of Revenue.

Witness our hand and seal this 3rd day of January, 1992.

SAC AND FOX NATION TRIBAL COUNCIL

By: /s/ Sandra Keo
Sandra Keo, Chairperson

By: /s/ Mary (Kay) Hayes
Mary Kay Hayes, Secretary

STATE OF KANSAS

By: /s/ Joan Finney
Joan Finney, Governor

KANSAS DEPARTMENT OF
REVENUE

By: /s/ Mark Beshears
Mark Beshears, Secretary

APPROVED:

/s/ Lance W. Burr
Lance W. Burr, Special Counsel
for Sac and Fox Nation

TAX COMPACT BETWEEN THE IOWA TRIBE OF KANSAS AND NEBRASKA AND THE KANSAS DEPARTMENT OF REVENUE

This Agreement is made and entered into this 19th day of September, 1991 by and between the Iowa Tribe of Kansas and Nebraska (hereinafter "Iowa Tribe") and the Department of Revenue of the State of Kansas (hereinafter "Department").

WHEREAS, it is agreed by and between the Iowa Tribe and Department that it is mutually beneficial to the parties to cooperate in matters relating to taxation; and

WHEREAS, the Legislature of the State of Kansas has authorized tax collection agreements between the Iowa Tribe and Department to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction; and

WHEREAS, the Iowa Tribe reservation comprises approximately sixty (60) square miles surrounded by the states of Kansas, Nebraska and Missouri; and

WHEREAS, the Iowa Tribe has enacted tribal tax laws and is currently collecting taxes on sales of the following: general merchandise, cigarettes, tobacco products, motor fuels and special fuels; and

WHEREAS, the Iowa Tribe provides programs and services which are funded in part from existing tribal taxes which programs and services include the following:

(1) Construction and maintenance of roadways [approximately twenty six (26) miles] and bridges benefiting

both tribal and non-tribal members at a cost of $4.2 million since 1982.

(2) Maintenance of an independent water system benefiting tribal and non-tribal members.

(3) Operation of a fire department benefiting tribal and non-tribal residents of the Reservation and surrounding local communities and areas.

(4) Operation of low income housing benefiting tribal and non-tribal members.

(5) Providing health insurance for employees of businesses operated by the Iowa Tribe.

(6) Providing college scholarships for tribal members graduating from high school [five (5) per year].

(7) Maintaining four (4) cemeteries and providing burial funds for tribal members.

(8) Operating a food distribution program (in lieu of food stamps) for tribal and non-tribal members.

WHEREAS, if many of the above-described programs and services were not provided by the Iowa Tribe, Kansas would very likely be called upon to fund and provide the services; and,

WHEREAS, the geographic location of the Iowa Tribe Reservation is such that it is believed that businesses operated on the Reservation do not compete directly with businesses operated by merchants in surrounding areas and communities.

NOW, THEREFORE, the parties agree as follows:

1. *Definition of Terms.* As used in this agreement, the following terms shall mean the following:

a. "Iowa Tribe" means the Iowa Tribe of Kansas and Nebraska, an Indian tribe recognized by the Congress of the United States.

b. "Reservation" means those areas subject to tribal jurisdiction ("Indian Country") as defined by 18 U.S.C. Section 1151.

c. "Excise Tax" means those taxes imposed by the state of Kansas on retail sales (K.S.A. 79-3601 et seq.); cigarettes (K.S.A. 79-3301 et seq.); motor fuels (K.S.A. 79-3401 et seq.); special fuels (K.S.A. 79-3474 et seq.) and tobacco products (K.S.A. 79-3370 et seq.).

2. No Kansas excise tax shall be imposed on any transaction occurring on the Iowa Tribe Reservation so long as such transaction is subject to an Iowa Tribe tax (the "Tribal Tax") imposed thereon which is no less than the following tax amounts:

a.	Motor and Special Fuels	$.05/gal.
b.	Cigarette and Tobacco Products	$.04/pkg.
c.	General Sales	2%
d.	New Construction Materials	4%

3. A fully executed copy of the enacting resolution of the governing body of the Iowa Tribe imposing any such "Tribal Tax" shall be filed with the Department of Revenue.

4. This Compact does not affect or pertain to any local option tax on sales levied by a county on transactions occurring on the Reservation.

5. The Department of Revenue may review tax collection records of the Iowa Tribe at the Iowa Tribe general offices upon request in writing by the Secretary of the Department of Revenue mailed to the Iowa Tribe at least fourteen (14) days in advance.

6. The State of Kansas hereby relinquishes the jurisdiction it may have to levy and collect Excise Taxes on sales by merchants on the Iowa Tribe Reservation subject to the following conditions:

a. Such merchants are authorized by the Iowa Tribe to do business on the Reservation;

b. Such merchants are paying Tribal Taxes to the Iowa Tribe;

c. Such excise taxes imposed by the Iowa Tribe shall not be less than those specified in Paragraph 2 of this Compact.

7. The Iowa Tribe agrees to diligently pursue collection of any Tribal Tax imposed on merchants transacting business on the Reservation.

8. In the event the Department enters into a tax collection or similar compact with any other Indian tribe which agreement is more favorable to that tribe (in the view of the Iowa Tribe) than this Compact, Department will amend this Compact to adopt the "more favorable provisions" if requested to do so by the Iowa Tribe.

9. In no event shall this Compact be construed to be a waiver of the sovereignty of the Iowa Tribe or a concession that the State of Kansas has any jurisdiction whatsoever on the Iowa Reservation.

10. This Compact shall be null and void and of no further force or effect if the Congress of the United States or the United States Supreme Court declares that states may not impose excise taxes on transactions involving nonIndians occurring on Indian reservations.

11. This Compact shall be for a term of five (5) years from the effective date hereof; provided, however, this agreement shall be renewable for an additional five (5) year term by mutual consent of the parties.

12. This Compact shall be binding and effective only after it has been approved by the Iowa Tribe by its Executive Committee, the Governor, the Kansas Secretary of Revenue and the Kansas Legislature.

Witness our hand and seal this 19th day of September, 1991.

"IOWA TRIBE"

IOWA TRIBE OF KANSAS AND NEBRASKA

By: /s/ Leon Campbell
Leon Campbell, Chairman

By: /s/ Aquila Tilton
Aquila Tilton, Secretary

APPROVED:

IOWA TRIBE OF KANSAS AND
NEBRASKA EXECUTIVE COMMITTEE

By: /s/ Leon Campbell
Leon Campbell

By: /s/ John Kreitzer
John Kreitzer

By: /s/ Aquila Tilton
Aquila Tilton

By: /s/ George W. Ogden
George Odgen

By: /s/ Harvey Frederick
Harvey Frederick

APPROVED:

/s/ Joan Finney
Joan Finney, Governor
State of Kansas

/s/ Mark Beshears
Mark Beshears, Secretary
Kansas Department of Revenue

**TAX COMPACT BETWEEN THE
KICKAPOO NATION AND THE
KANSAS DEPARTMENT OF REVENUE**

This Agreement is made and entered into this 19th day of SEPTEMBER, 1991, by and between the Kickapoo Nation and the Department of Revenue of the State of Kansas (hereinafter "Department").

WHEREAS, the Kickapoo Nation exists in a treaty relationship with the United States of America; and

WHEREAS, President Bush on June 14, 1991, issued an American Indian policy statement which reaffirmed the government-to-government relationship between Indian Nation tribes and the Federal Government; and

WHEREAS, Kickapoo Nation Self-Determination must be based on economic Self-Sufficiency; and

WHEREAS, it is agreed by and between the Kickapoo Nation and Department that it is mutually beneficial to the parties to cooperate in matters relating to taxation; and

WHEREAS. the Legislature of the State of Kansas has authorized tax collection agreement's between the Kickapoo Nation and Department to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction; and

WHEREAS, the Kickapoo Nation has enacted tribal government tax laws and is currently collecting taxes on sales of the following: general merchandise, cigarettes, tobacco products, motor fuels and special fuel; and

WHEREAS, the Kickapoo Nation provides programs and services which are funded in part from existing tribal taxes which programs and services include the following:

(1) Operation and maintenance of a Tribal Judicial Court system benefiting both tribal and non-tribal members.

(2) Construction and maintenance of roadways and bridges benefiting both tribal and non-tribal members.

(3) Maintenance of an independent tribally-operated water plant and distribution system benefiting tribal and non-tribal members.

(4) Operation of a volunteer fire department benefiting tribal and non-tribal residents of the Reservation and surrounding local communities and areas.

(5) Operation of low income housing benefiting tribal and non-tribal members.

(6) Operation of the Kickapoo Nation School (K-12) for tribal and non-tribal members.

(7) Operation of a drug and alcohol half-way house rehabilitation center benefiting tribal and non-tribal members.

(8) Operation of the Kickapoo Nation Social Services Program benefiting tribal and non-tribal members.

WHEREAS, if many of the above-described programs and services were not provided by the Kickapoo Nation, Kansas would very likely be called upon to fund and provide the services; and

WHEREAS, the geographic location of the Kickapoo Nation Reservation is such that it is believed that businesses operated on the Reservation do not compete directly with businesses operated by merchants in surrounding areas and communities.

NOW, THEREFORE, the parties agree as follows:

1. *Definition of Terms.* As used in this agreement, the following terms shall mean the following:

a. "Kickapoo Nation" means the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas referred to as the Kickapoo Nation, an Indian Nation Tribe recognized by the Congress of the United States.

b. "Reservation" means those areas subject to tribal jurisdiction ("Indian Country") as defined by 18 U.S.C. Section 1151.

c. "Excise Tax" means those taxes imposed by the state of Kansas on retail sales (K.S.A. 79-3601 et seq.); cigarettes (K.S.A. 79-3301 et seq.); motor fuels (K.S.A. 79-3401 et seq.); special fuels (K.S.A. 79-3474 et seq.) and tobacco products (K.S.A. 79-3370 et seq.).

2. No excise tax of Kansas or its governmental subdivisions shall be imposed on any transaction occurring on the Kickapoo Nation reservation so long as such transaction is subject to a Kickapoo Nation tax (the "Tribal Tax") imposed thereon which is no less than, the following tax amounts:

a.	Motor and Special Fuels	$.06/gal.
b.	Tobacco Products	$.10/pkg.
c.	General Sales	2%

3. A fully executed copy of the enacting resolution. of the governing body of the Kickapoo Nation imposing any such Tribal Tax shall be filed with the Department of Revenue.

4. The State of Kansas hereby relinquishes the jurisdiction it and its governmental subdivisions may have to levy and collect Excise Taxes on sales by merchants on the Kickapoo Nation Reservation subject to the following conditions:

a. Such merchants are authorized by the Kickapoo Nation to do business on the Reservation;

b. Such merchants are paying Tribal Taxes to the Kickapoo Nation;

c. Such excise taxes imposed by the Kickapoo Nation shall not be less than those specified in Paragraph 2 of this Compact.

5. The Kickapoo Nation agrees to diligently pursue collection of any Tribal Tax imposed on merchants transacting business on the Reservation.

6. The Kickapoo Nation agrees to certify on forms provided by the Department that it is collecting the taxes set forth in Paragraph 2. Upon request by the Department, the Kickapoo Nation shall provide supporting certification documentation at the Department's offices not more than twice a year.

7. In no event shall this Compact be construed to be a waiver of the sovereignty of the Kickapoo Nation or a concession that the State of Kansas has any jurisdiction whatsoever on the Kickapoo Reservations.

8. This Compact shall be null and void and of no further force or effect if the Congress of the United States

or the United States Supreme Court declares that states may not impose excise taxes on transactions involving nonindians occurring on Indian reservations.

9. This Compact shall be for a term of five (5) years from the effective date hereof; provided, however, this compact shall be renewable for an additional five (5) year term or a longer period of time by mutual consent of the parties.

10. This Compact shall be binding and effective only after it has been approved by the Kickapoo Nation Tribal Council, the Governor, and the Kansas Secretary of Revenue.

Witness our hand and seal this 19th day of SEPTEMBER, 1991.

KICKAPOO NATION TRIBAL COUNCIL

By: /s/ Steve Cadue
Steve Cadue, Chairman
of the Kickapoo Nation

By: /s/ Verna R. Simon
Verna R. Simon; Secretary
of the Kickapoo Nation

APPROVED:

/s/ Joan Finney
Joan Finney, Governor
State of Kansas

/s/ Mark Beshears
Mark Beshears, Secretary
Kansas Department of Revenue

TAX COMPACT BETWEEN THE PRAIRIE BAND OF POTAWATOMI NATION AND THE STATE OF KANSAS

This Compact is made this 10th day of January, 1992, by and between the Prairie Band of Potawatomi Indians (hereinafter the "Tribe") and the State of Kansas (hereinafter) the "State"):

Whereas, The Tribe is a federally recognized Indian tribe, duly-organized pursuant to the Constitution and By-Laws of the Prairie Band of Potawatomi Indians, approved by the Secretary of the Interior on February 19, 1976, as amended thereafter, and

Whereas, both the Tribe and the State recognize the duty of each to negotiate with the other on a government-to-government basis pursuant to our national Indian policy of economic, social and political self-determination for Indian tribes; and

Whereas, the Supreme Court has repeatedly recognized the inherent sovereign power of Indian tribes to impose and collect taxes upon business operating within their reservation boundaries; and

Whereas, it is agreed between the Tribe and the State that it is to their mutual benefit to cooperate in matters relating to taxation; and

Whereas, the Legislature of the State of Kansas has authorized tax collection agreements between the State and Indian tribes to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on reservations and those off reservations;

Now therefore, the Tribe and the State agree as follows:

1. Definition of Terms. As used in this Compact each of the following terms shall have the following meaning, unless the context clearly indicates a different meaning:

(a) "Reservation" means all Indian country as defined by 18 U.S.C. § 1151 which subject to the jurisdiction of the Tribe.

(b) "Excise tax" means, respectively, a tax on sales (KS-A. 79-3601 *et seq.*); tax on cigarettes (K.S.A. 79-3301 *et seq.*); a tax on motor fuels (K.S.A. 79-3401 *et seq.*); a tax on special fuels (K.S.A. 79-3474 *et seq.*); and a tax on tobacco products (K.S.A. 79-3370 *et seq.*); and any of the foregoing five taxes established by tribal law.

(c) "Local option tax" means any tax imposed by a Kansas country upon any transaction occurring on the Reservation or upon any other product or activity upon the Reservation.

2. State Taxes Not to be Imposed. No state excise tax or local option tax shall be imposed upon any transaction with a non-Indian purchaser which occurs on the Reservation while the Tribe shall have in effect and shall actively impose, collect and enforce upon any such transaction, an excise tax of not less than sixty percent (60%) of the rate of such state excise tax for each such excise tax included within the definition of that term in subsection 1(b) of this Compact.

3. Proof of Tribal Tax Ordinance. Such tribal tax shall be deemed to be enacted only when a copy of the tribal tax ordinance, together with a fully executed copy of

the enacting resolution of the Tribal Council, is filed with the Tribal Secretary; within ten (10) days thereafter, a copy of the tribal tax ordinance and an executed copy of the enacting resolution of the Tribal Council shall be filed with the Department of Revenue.

4. Tribal Contribution to Banner Creek Reservoir Project. The Tribe agrees to pay to Jackson County a tribal contribution to the Banner Reservoir Project in the sum of $16,000.00 per annum.

5. Violation of Tribal Tax Law; Enforcement of Penalties for Violations.

(a) Notice of Probable Violation to Tribal Council. Whenever it shall come to the attention of the Director of Revenue that any person is probably conducting business on the Reservation without collecting and remitting tribal taxes as required by this Compact, the Director shall notify the Tribal Council of such violation and of the need for tribal enforcement of tribal penalties for such violation in Tribal Court of such offender either civilly or, in case such person is an enrolled member of any Indian tribe, civilly or criminally or both, as the Tribal Council may determine.

(b) Enforcement of Penalties for Violations in Tribal Court. At any time it deems a violation of tribal tax laws to have occurred, or within thirty (30) days of receipt of any such notice of violation from the Sate, the Tribal Council shall file an action in Tribal Court to enforce tribal penalties against such person either civilly or criminally or both, as the Tribal Council may determine.

(c) State Inspection of Tribal Tax Records. In such enforcement action in Tribal Court, all tribal tax records with respect to pertinent transactions on the Reservation involving the person against whom tribal penalties are being enforced shall be made evidence of the Tribal Court and as such shall be open to inspection by the State at any time.

6. Terms of Relinquishment of State Jurisdiction. The State hereby relinquishes whatever jurisdiction it may have to impose and collect excise taxes as herein defined from any merchant upon any transaction with a non-Indian purchaser which occurs on the Reservation, subject to the following conditions:

(a) Such merchant shall be authorized to do business on the Reservation pursuant to applicable tribal law;

(b) Such merchant shall pay such corresponding excise taxes to the Tribe; and

(c) Such excise taxes imposed and collected by the Tribe shall be not less than sixty percent (60%) of corresponding excise taxes imposed by the State on any such transaction outside the Reservation.

7. Term of Compact: Renewal. The term of this Compact shall be for a term of five (5) years from the effective date hereof; provided, however, that this Compact shall be renewable for additional five (5) year terms by mutual consent of the Tribe and the State as follows:

(a) Periodic Review. The provisions of this Compact shall be subject to review at five (5) year intervals dating from the effective date of this Compact. One hundred eighty (180) days prior to the expiration of any such five (5) year term, either party to this Compact may notify

the other of provisions which it believes require review or amendment. Such notice shall be in writing and shall be sent by certified mail to the Chairman of the Tribe, the Governor of the State or any other appropriate governmental official of either.

(b) Notice of Need to Resolve Issues. Upon receipt of such notice by either party, the parties shall engage in good faith efforts to resolve the issues identified in the notice. The parties shall have the balance of the 180-day period within which to negotiate. The Tribe and State may agree to extend the 180-day period without prejudice to the rights of either party.

(c) Termination for Failure to Resolve Issues. In the event the parties are unable to resolve the issues identified in the notice within the balance of the 180-day period or any extension thereof upon the expiration of such period, this Compact shall terminate.

(d) Termination for Substantial Breach. Either party may terminate this Compact upon a substantial breach by the other party regardless of any other provision of this Compact. Upon identification of what either party believes to be a substantial breach of the terms of this Compact, such party shall notify the other party in writing, via certified mail, return receipt requested, as to the nature of the substantial breach. The party issuing such notice shall refrain from terminating this Compact until 30 days have elapsed from receipt of such notice by the other party.

8. Tribal Sovereign Immunity Not Waived. Nothing contained in this Compact shall be deemed to waive the sovereign immunity of the Tribe to suit in any court, state or federal.

9. Effective Date. This Compact shall be binding and effective only after it has been approved by the Governor of Kansas, and the Tribe by written resolution of the Tribal Council; the last such date shall be the "effective date" hereof.

Witness our hand and seal this 10th day of January, 1992.

/S/
Mark Beshears, Director
Department of Revenue

/S/
George Wahquahboshkuk,
Chairman
Prairie Band of
Potawatomi Indians
Tribal Council

/S/
Grace Wahwassuck,
Secretary

Approved:

/S/
Joan Finney
Governor of Kansas

FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-631

In the Supreme Court of the United States

JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER

v.

PRAIRIE BAND POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state motor fuels tax that is "imposed on the use, sale, or delivery" of motor fuel, Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003), may be imposed on motor fuel that a non-Indian, off-reservation distributor delivers and sells directly to an Indian Tribe at its on-reservation service station.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 5
Argument:
The Kansas Motor Fuels Tax is preempted as applied to sales to the Prairie Band Potawatomi Nation within its Reservation 7
A. Under the Kansas Supreme Court's decision in *Kaul*, the tax is preempted because its incidence is on the Tribe 9
B. Even if the legal incidence of the tax is on the distributor, the tax is preempted by the Indian Trader Statutes because it is imposed on the sale or delivery of fuel to the Tribe on its Reservation 20
c. The court should continue to employ the balancing of interests test in evaluating state taxes that burden Indian tribes but whose legal incidence does not rest on the tribes 27
Conclusion 30

TABLE OF AUTHORITIES

Cases:

American Oil Co. v. *Neill*, 380 U.S. 451 (1965) 10
Atkinson Trading Co. v. *Shirley*, 532 U.S. 645 (2001) 16
California Bd. of Equalization v. *Chemehuevi Tribe*, 474 U.S. 9 (1985) 9, 10, 18
Central Mach. Co. v. *Arizona Tax Comm'n*, 448 U.S. 160 (1980) 6, 20, 21, 23

Cases—Continued: Page

City of Detroit v. *Murray Corp. of America*, 355 U.S. 489 U.S. 492 (1958) 13
Coeur D'Alend Tribe of Idaho v. *Hammond*, 384 F.3d 674 (9th Cir. 2004), cert. denied, 125 S. Ct. 1397 (2005) 13
Cotton Petrolem Corp. v. *New Mexico*, 490 U.S. 163 (1989) 25, 27
Department of Taxation and Finance v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994) 22, 23, 24
Diamond Nat'l Corp. v. *State Bd. of Equalization*, 425 U.S. 268 (1975) 19
First Agric. Nat'l Bank v. *State Tax Comm'n*, 392 U.S. 339 (1968) 13
Gurley v. *Rhoden*, 421 U.S. 200 (1975) ... 10, 11, 12, 17
Kaul v. *Kansas Dep't of Revenue*, 970 P.2d 60 (Kan. 1998), cert. denied, 528 U.S. 812 (1999) 3, 4, 6, 9, 11, 12, 16, 18, 19
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 (1954) 10
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 25
Moe v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 61 (1976) 22
Montana v. *Blackfeet Tribe*, 471 U.S. 759 (1985) 7, 8, 16
Oklahoma Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) ..... *passim*

Cases—Continued: Page

Oklahoma Tax Com'n v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) 28
Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 144 (1993) 10, 28
Ramah Navajo School Board, Inc. v. *Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) 28
Sac & Fox Nation v. *Pierce*, 213 F.3d 566 (10th Cir. 2000), cert. denied, 531 U.S. 1144 (2001) 5, 10, 17, 18, 21, 22
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) 7
The New York Indians, 72 U.S. (5 Wall.) 761 (1867) 7
United States v. *Mississippi Tax Comm'n*, 421 U.S. 599 (1975) 10, 13, 17, 18, 19
Warren Trading Post Co. v. *Arizona Tax Commission*, 380 U.S. 685 (1965) 20, 23
Washington v. *Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) 10, 23, 24, 25, 27
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 7, 23, 27
Wooster v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 20

Constitution, statutes and regulation:

U.S. Const. Art. I, § 8, Cl. 3 (Indian Commerce Clause) 1, 20
Act of July 22, 1790, ch. 33, 1 Stat. 137 20
25 U.S.C. 261 *et seq* 1, 6, 20

Statutes and regulations—Continued: Page

25 U.S.C. 264 21
26 U.S.C. 4081(a)(2) 2
Kansas Motor Fuel Tax Act, Kan. Stat. Ann.
§§ 79-3401 *et seq.* (1997 & Supp. 2003) 2, 20
§ 79-3408 (Supp. 2003) 11
§ 79-3408(a) 2, 13, 14, 19, 20
§ 79-3408(c) (Supp. 2003) 4, 11, 12, 13, 14
§ 79-3408(d)(1) 3, 16
§ 79-3408(d)(2) 3, 15
§ 79-3408(d)(5) 14
§ 79-3408c(a) 15
§ 79-3408c(b) 15
§ 79-3408c(c) 15
§ 79-3408g(d)(2) 4
§ 79-3409 ..... 12, 13
§ 79-34,141 3
Kan. Stat. Ann.:
§ 60-3201 (1994) 11
§ 84-2-106(1) (1996) 21
§ 84-2-401(2) (1996) 21
Kan. Sess. Laws ch. 96, § 2 4
25 C.F.R. Pt. 170 26
Section 170.932(d) 26

Miscellaneous:

Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes*, 78 Or. L. Rev. 501(1999) 28

Miscellaneous: Page

Bureau of Indian Affairs, *Transportation Serving Native American Lands* (May 2003) 26
69 Fed. Reg. 43,090 (2004) 26
S. Rep. No. 406, 106th Cong., 2d Sess. (2000) 26
U.S. Dep't of Transp., *Fatal Motor Vehicle Crashes on Indian Reservations 1975-2002*, Rep. No. DOT HS 809-727 (Apr. 2004) 26

In the Supreme Court of the United States

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JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER

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PRAIRIE BAND POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Petitioner seeks to collect a tax on motor fuel that a non-Indian, off-reservation distributor delivers to an Indian Tribe at the Tribe's on-reservation service station. The United States has a substantial interest in this case by virtue of the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, and the government's trust relationship with Indian Tribes.

STATEMENT

1. Respondent Prairie Band Potawatomi Nation (the Tribe) is a federally recognized Tribe with a 121-square mile reservation in Jackson County, Kansas. J.A. 133. The Tribe's

Reservation is located in a rural area some 25 miles north of Topeka, Kansas. The Tribe's chief source of income is a tribally owned and operated on-reservation casino that generates substantial non-Indian traffic onto the Reservation. *Ibid.* The Tribe also owns and operates a retail gas station and convenience store adjacent to the casino that is known as the Nation Station. *Ibid.* The Tribe purchases gasoline and diesel fuel from an off-reservation, non-Indian distributor, Davies Oil Company, which delivers the fuel to the Nation Station. See J.A. 133.

The Nation Station sells fuel at the prevailing retail market price. J.A. 133-134. The Tribe has historically included in its market price a tribal tax, comparable to state motor fuel taxes. The tax originally was imposed at a rate of 16 cents per gallon for gasoline and 18 cents for diesel fuel, but those rates were increased to 20 and 22 cents per gallon, respectively, beginning January 2003. J.A. 48-50, 134. That tax has generated about $300,000 in revenues to the Tribe each year. J.A. 134. The Tribe, like other sovereigns, has employed those revenues for building and maintaining roads, including maintenance on the approximately one-and-one-half mile tribal road that connects the casino to United States Highway 75. *Ibid.*

2. The State of Kansas, like the federal government (see 26 U.S.C. 4081(a)(2)), other States, and many Indian Tribes, imposes a per-gallon tax on motor vehicle fuel. See Kansas Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997 & Supp. 2003). That tax is "imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in [the] state for any purpose whatsoever." *Id.* § 79-3408(a) (1997 & Supp. 2003). Beginning July 1, 2003, the state tax is imposed at a rate of 24 cents per gallon for

gasoline and 26 cents per gallon for special fuels, including diesel. *Id.* § 79-34,141 (1997 & Supp. 2003).[1]

In 1992, Kansas and the Tribe entered into an inter-governmental agreement respecting excise taxes, including taxes on motor fuel. See J.A. 20-26. That agreement, which had a five-year, renewable term, sought "to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction." J.A. 21. At that time, Kansas did not tax motor fuels delivered within Indian reservations. See *Kaul* v. *Kansas Dep't of Revenue*, 970 P.2d 60, 63 (Kan. 1998), cert. denied, 528 U.S. 812 (1999); see J.A. 18-19. Under the tribal-state agreement, the State "relinquishe[d] whatever jurisdiction it may have had to impose" a motor fuel tax for "any transaction with a non-Indian purchaser which occurs on the Reservation," subject to the conditions that the merchant be authorized under tribal law to do business on the Reservation and the merchant pay a tax to the Tribe that is not less than 60% of the prevailing state tax. J.A. 23-24.

In 1995, the Kansas legislature amended its motor fuel tax provisions. See *Kaul*, 970 P.2d at 64, 65-66. The 1995 Act, *inter alia*, amended the exception for the sale or delivery of fuel to the United States and its tax-exempt agencies to provide that "this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail

---

[1] The Kansas statute provides, however, that "[n]o tax is hereby imposed upon or with respect to" certain transactions, including "[t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country," or "to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation." Kan. Stat. Ann. § 79-3408(d)(1) and (2) (1997 & Supp. 2003). The Kansas statute provides no comparable express exemption for motor fuel sold or delivered to an Indian Tribe.

dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a non-member of such reservation." See Kan. Stat. Ann. § 79-3408g(d)(2) (1997) (repealed July 1, 1998); *Kaul*, 970 P.2d at 65.

In 1997, the State declined to renew the 1992 tribal-state agreement, thereby eliminating the contractual impediment that the agreement placed to imposing a motor fuel tax on sales to retailers operating on the reservation. And in 1998, after this Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995), the Kansas legislature further amended its motor fuel tax provisions to state that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). See Kan. Sess. Laws ch. 96, § 2 (July 1, 1998).

3. The Tribe brought this suit to obtain declaratory and injunctive relief preventing Kansas from imposing its fuel tax on gasoline and diesel fuel delivered to the Tribe itself. See J.A. 10-13 (amended complaint). Specifically, the Tribe sought an order enjoining petitioner "from enforcing its state motor fuel taxes, including those under K.S.A. 79-3408, and from collecting such taxes from the Nation or its distributors with respect to motor fuel transactions or events involving motor fuel obtained by the Nation and sold by it at retail on its reservation." J.A. 13.

a. Petitioner moved for summary judgment, arguing among other things that neither federal law nor the Tribe's right of self-government preempts the state tax. See J.A. 94, 111-120. The district court identified this Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, *supra*, as providing the guiding principle. The district court stated

that, if "the legal incidence of the tax rests on non-Indians," then "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy." J.A. 112 (quoting *Chickasaw Nation*, 515 U.S. at 458). The district court recognized that the Tenth Circuit had previously ruled, in a decision construing the same Kansas Motor Fuel Tax Act, that "the legal incidence of the Kansas motor fuel tax falls upon the distributors," *Sac and Fox Nation* v. *Pierce*, 213 F.3d 566, 580 (2000), cert. denied, 531 U.S. 1144 (2001). See J.A. 117. The court granted petitioner's request for summary judgment, reasoning that the balance of interests weighed in favor of allowing the tax. J.A. 114; see J.A. 119-120.

b. The court of appeals reversed. J.A. 131-144. The court of appeals followed its prior ruling in *Sac and Fox Nation* that "[t]he Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors." J.A. 135. It therefore concluded, in accordance with this Court's decision in *Chickasaw Nation*, that the State's power to impose the tax depends on "the balance of federal, state, and tribal interests." J.A. 136 (quoting 515 U.S. at 459). The court of appeals concluded that "the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax." J.A. 137.

The court of appeals reasoned that, in this case, the Tribe's "fuel revenues are derived from value generated primarily on its reservation," J.A. 137, "because its fuel marketing is integral and essential to the gaming opportunity the Nation provides." J.A. 138. The court of appeals also concluded that the Tribe's "interests here are strengthened be-

cause of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance," J.A. 141, and "are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments." J.A. 142. By contrast, the court reasoned, the State had only a generalized interest in raising revenue, which was insufficient to uphold application of the tax. J.A. 143-144.

SUMMARY OF ARGUMENT

This Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450 (1995), makes clear that a State cannot impose the "legal incidence" of an excise tax, such as a motor fuel sales tax, on an Indian Tribe. In this case, the Kansas Supreme Court has determined in *Kaul* v. *Kansas Department of Revenue*, 970 P.2d 60 (1998), cert. denied, 528 U.S. 812 (1999), that Kansas does in fact tax retailers like respondent. The state supreme court's determination rests on a reasonable construction of the state statute and should be treated as conclusive on that matter. The Court should therefore affirm the court of appeals' judgment on that alternative (and logically antecedent) basis.

If the Court nevertheless concludes that the legal incidence of the tax is on the non-Indian distributor, that is not the end of the inquiry. The delivery and sale of goods, including gasoline, to an Indian Tribe on its reservation is subject to the Indian Trader Statutes, 25 U.S.C. 261 *et seq.* This Court held in *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980), that the State of Arizona could not impose its gross receipts tax on a non-Indian seller based on the sales price of tractors sold and delivered to an Indian Tribe on its reservation, even where the seller had no established place of business on the reservation. Under *Central Machinery*, the Kansas motor fuel tax is likewise preempted insofar as it is imposed on the sale and delivery of motor fuel to the Tribe, which imposes its own tax on sales of gasoline at the service station and sells the gasoline at prevailing prices.

Finally, even if the Indian Trader Statutes of their own force do not preempt the state tax here, then, as this Court reaffirmed in *Chickasaw Nation*, 515 U.S. at 458-459, the courts should conduct a balancing of the relevant tribal, federal, and state interests. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-145 (1980). The Court should reject the State's extraordinary suggestion that the Court abandon its firmly established balancing test, which properly takes into account the interests of all the affected sovereigns.

ARGUMENT

THE KANSAS MOTOR FUELS TAX IS PREEMPTED AS APPLIED TO SALES TO THE PRAIRIE BAND POTAWATOMI NATION WITHIN ITS RESERVATION

The Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450 (1995), "adhere[d] to settled law" and reaffirmed the fundamental and longstanding principle that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Id.* at 453, 455 (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). See *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). The Court therefore stated, as a controlling principle, that "when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian Country." *Chickasaw Na-*

tion, 515 U.S. at 453. But even when the state tax is not imposed directly on Indians, it may be preempted if it impermissibly intrudes upon the protected interests of the Tribe or individual Indians or is inconsistent with particular measures adopted for their benefit by the federal government, which is vested by the Constitution with "exclusive authority over relations with Indian tribes." *Blackfeet Tribe*, 471 U.S. at 764.

These principles were synthesized by the Court in *Chickasaw Nation*, 515 U.S. at 457-460, which explained:

> The initial and frequently dispositive question in Indian tax cases * * * is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. * * * But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy * * * and may place on a tribe or tribal members "minimal burdens" in collecting the toll.

Id. at 458-459 (citations omitted).[2]

[2] The Court noted that the "legal incidence" test, as opposed to a "more venturesome approach" at the threshold, maintains the historic presumption that federal law preempts state taxation of Indian Tribes, and thereby preserves Congress's lead role "in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459. In addition, the "legal incidence" test "accommodates the reality that tax administration requires predictability." *Id.* at 459-460. It also enables a State to restructure its tax system to accomplish its revenue collection goals without imposing inappropriate burdens on Indian Tribes by, for example, "declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Id.* at 460 (quoting 94-771 Pet. for. Cert. at 17).

The *Chickasaw Nation* case, like this case, involved a State's attempt to impose a fuel excise tax on motor fuel that the Tribe sold at retail stores on tribal trust land. See 515 U.S. at 452-453. The Court concluded, based on a "fair interpretation of the taxing statute as written and applied," that the legal incidence of the State's fuel tax in that case rested on the Tribe. *Chickasaw Nation*, 515 U.S. at 461-462 (quoting *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Federal law accordingly preempted the state tax. *Ibid.*

Under *Chickasaw Nation*, then, the first inquiry in this case is whether the legal incidence of the tax "rests on the Tribe (as retailer) or on some other transactors—here, the wholesalers who sell to the Tribe or the consumers who buy from the Tribe." 515 U.S. at 459. As we explain below, in light of the Kansas Supreme Court's decision in *Kaul* v. *Kansas Department of Revenue*, 970 P.2d 60 (1998), cert. denied, 528 U.S. 812 (1999), it appears that the legal incidence of the Kansas tax is on the Tribe. But even if the Court concludes that the incidence of the tax is on the non-Indian distributor, the tax is preempted under the principles reaffirmed in *Chickasaw Nation*.

A. Under The Kansas Supreme Court's Decision In *Kaul*, The Tax Is Preempted Because Its Incidence Is On The Tribe

This Court's decisions provide concrete guidance on how to determine where the "legal incidence" of the tax lies. The Court has made clear that "the question is one of 'fair interpretation of the taxing statute.'" *Chickasaw Nation*, 515 U.S. at 461 (quoting *California Bd. of Equalization*, 474 U.S. at

11). A court may take into account the existence—or not—of any express "collection requirements" or "pass-through provisions." *Chemehuevi Tribe*, 474 U.S. at 11. In the end, however, the determination depends on the overall character of the tax. *Ibid.*[3]

"'[T]he duty rests on this Court to decide for itself'" where the legal incidence of the tax lies. *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 n.7 (1975) (quoting *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954)). But federal courts, of course, should not evaluate state taxing statutes in a vacuum, and should consult the constructions provided by state supreme courts. See *Mississippi Tax Comm'n*, 421 U.S. at 609 n.7. "When a state court has made its own definitive determination as to the operating incidence, [the Court's] task is simplified. [The Court] give[s] this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Gurley* v. *Rhoden*, 421 U.S. 200, 208 (1975) (quoting *American Oil Co.* v. *Neill*, 380 U.S. 451, 455-456 (1965)).

In this case, the Tenth Circuit too readily assumed—based on the holding in its earlier decision in *Sac and Fox*, 213 F.3d at 580—that the legal incidence of the Kansas motor fuel tax is on the distributor. See J.A. 117, 135. The Tenth Circuit in *Sac and Fox* failed to give the weight this Court's decisions required it to give to the Kansas Supreme Court's decision in

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[3] See, *e.g.*, *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114, 126-128 (1993) (Oklahoma cannot avoid this Court's decisions "by avoiding the name 'personal property tax' here any more than Washington could in *Colville*"); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 164 (1980) (Washington cannot avoid this Court's tax immunity decisions through "mere nomenclature").

Kaul. The Kansas Supreme Court's decision in *Kaul*, although not without some ambiguity, is best read as holding that the incidence of the very tax at issue here is on the retailer. As explained below, that decision is "consistent with the statute's reasonable interpretation"—even if it is not the one this Court might adopt in the first instance—and it therefore should be "deemed conclusive." *Gurley*, 421 U.S. at 208.[4]

1. The Court's task here, as in *Chickasaw Nation*, is to determine where the legal incidence of the tax resides. See 515 U.S. at 461-462. The Kansas statute states, as a result of the 1998 post-*Chickasaw Nation* amendment, that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) But that legislative statement is not dispositive in light of the Kansas Supreme Court's construction of the statute in *Kaul*. The Kansas Supreme Court determined that, notwithstanding that statement, the statute, read as a whole, manifested a legislative intent that "[r]etailers are taxed." 970 P.2d at 67.

The plaintiffs in *Kaul*—Indian retailers on the Prairie Band Potawatomi Nation Reservation who were not members of the Tribe—sought relief from imposition of the Kansas motor fuels tax on sales made to them by an off-reservation distributor. The Kansas Supreme Court recognized that the 1998 amendment to Kan. Stat. Ann. § 79-3408(c) newly provided that "the incidence of the tax falls on the distributor." 970 P.2d at 67. But the court read that provision in conjunc-

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[4] To the extent the Court ultimately determines that the Kansas Supreme Court's decision in *Kaul* is insufficiently clear on the threshold issue of the legal incidence of the tax, the Court may, of course, certify that question to the Kansas Supreme Court, or remand the case to the Tenth Circuit with instructions to do so. See Kan. Stat. Ann. § 60-3201 (1994).

tion with Kan. Stat. Ann. § 79-3409 (1997 & Supp. 2003), which enables the distributor to collect the tax from the retailer. The Kansas Supreme Court concluded:

> The statute clearly states that the distributor is liable for the payment of the tax, but the distributor may collect the tax from the retailer as part of the selling price of the motor fuel.

970 P.2d at 67. The Kansas Supreme Court concluded that the legislature intended distributors to collect the tax from retailers and that, "[t]herefore, Retailers are taxed." *Ibid.* Although the court reached that conclusion in evaluating the retailers' standing, it indicated that that conclusion has a broader significance in the operation of the state statute. The court concluded that the retailers were not entitled to immunity from the tax only because they were not members of the Tribe. *Id.* at 68.[5]

2. The Kansas Supreme Court's conclusion that, under the Kansas scheme, "[r]etailers are taxed" rests on a reasonable construction of the state statute, and it therefore should be treated as conclusive. *Gurley*, 421 U.S. at 208. A number of features of the Kansas statute support the Kansas court's determination that the taxing statute, fairly interpreted "as written and applied," *Chickasaw Nation*, 515 U.S. at 461, imposes the legal incidence of the tax on the retailer, notwithstanding the insertion made by the 1998 amendments stating "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003).[6]

[5] The Kansas Supreme Court stated: "Under the circumstances, there has been no showing by Retailers that payment of fuel tax to Kansas interferes with the self-government of a Kansas tribe or a Kansas tribal member or the tax impairs a specific right granted or reserved by federal law to the Kansas Indians. Here, the legal incidence of the tax on motor fuel rests on nontribal members [*i.e.*, the nontribal member Retailers] and does not affect the Potawatomi Indian reservation within the state of Kansas or the members of that tribe." 970 P.2d at 68.

The text and structure of the Kansas statute, both before and after its 1998 amendment, clearly manifest the intent that the tax is imposed on the use, sale, and delivery of motor fuel, Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003), that the relevant transaction is that between the distributor and the retailer, and that the distributor is entitled to collect the tax from the retailer, Kan. Stat. Ann. § 79-3409 (1997 & Supp. 2003). In these circumstances, the Kansas Supreme Court could reasonably conclude that, in the end, "[t]he distributor 'is no more than a transmittal agent for the taxes imposed on the retailer.'" *Chickasaw Nation*, 515 U.S. at 461-462.[7]

[6] See *Chickasaw Nation*, 515 U.S. at 462 ("'[T]he import of the language and structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel'; the 'motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer.' 31 F. 3d, at 971-972."); cf. *Coeur D'Alene Tribe of Idaho* v. *Hammond*, 384 F.3d 674, 685 (9th Cir. 2004), cert. denied, 125 S. Ct. 1397 (2005) (holding that a state legislature's statement that the incidence of a tax falls on a distributor is insufficient, without more, to shift the legal incidence from the Tribe).

[7] The Court has "squarely rejected the proposition that the legal incidence of a tax always falls upon the person legally liable for its payment." *Mississippi Tax Comm'n*, 421 U.S. at 607. See *id.* at 607-608 (quoting *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347-348 (1968)). Furthermore, States are not entitled to impose forbidden taxes through a drafting sleight-of-hand in which a statute purports to impose a tax on one entity, but in actual operation imposes it on another. This Court has accordingly found that it "must look through form and behind labels to substance." *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 492 (1958).

The Kansas tax is expressly "imposed on the use, sale, or delivery of all motor-vehicle fuels or special fuels which are used, sold, or delivered in this state for any purpose whatsoever." Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003). That tax, like the Oklahoma tax in *Chickasaw Nation*, is by definition an excise or sales tax that is expressly levied on the use, sale, or delivery of fuel. The provision that nominally places the incidence of the tax on the distributor cannot be given dispositive weight, even apart from the Kansas Supreme Court's decision in *Kaul*, because it is in tension with Section 79-3408(a)'s direction that the sales tax is imposed on any sale "for any purpose whatsoever." Indeed, that provision itself suggests that the actual legal incidence falls on the retailer. It goes on to provide a 2.5% exemption allowance for fuel that the distributor receives but cannot sell on account of "physical loss" while the distributor is handling the fuel. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). That exemption (which itself contains an exception for federal agencies "exempt by law from liability to state taxation" (*ibid.*)) suggests that the relevant transaction is the actual delivery and sale of the fuel to the retailer—not the fuel in the possession of the distributor before the transfer—and that the legislature intended the tax to fall on the retailer who ultimately receives the fuel.

Furthermore, the statute as a whole reveals, in other respects, that the State has targeted the sale and delivery of fuel *to retailers* for imposition of the tax. For example, the statute provides that the incidence of the tax "is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once," Kan. Stat. Ann. § 79-3408(c) (Supp. 2003), but it exempts from taxation the first sale or delivery of fuel "to a duly licensed distributor who in turn resells to another duly licensed distributor," *id.* § 79-

3408(d)(5) (1997 & Supp. 2003). That provision makes clear that it is the distributor-retailer transactions, not the first delivery of the fuel to a distributor, nor distributor-distributor transactions, that trigger the tax. See *Chickasaw Nation*, 515 U.S. at 461 (noting that an exemption for "sales between distributors" supported the inference that "the tax obligation is legally the retailer's").

Even more strikingly, the Kansas statute exempts from the tax the "*sale or delivery*" of fuel in circumstances—such as the sale to the United States or its agencies "now or hereafter exempt by law from liability to state taxation"—where the Constitution or federal law would forbid the State from imposing a sales tax *on the purchaser*. Kan. Stat. Ann. § 79-3408(d)(2) (1997 & Supp. 2003). That exemption is highly instructive in evaluating the operating incidence of the Kansas tax for present purposes. If the tax does not fall on the purchaser/retailer, it would be strange to provide an exemption based on the purchaser's status.

The Kansas statute also provides that, if the State enacts a tax increase, the retailer is liable for a tax or refund in the amount of the increase with respect to any fuel in its existing inventory. Kan. Stat. Ann. § 79-3408c(a) and (b) (1997 & Supp. 2003). Correspondingly, if the tax rate decreases, the retailer is entitled to a refund with respect to any fuel in its existing inventory. *Id.* § 79-3408c(b). At odds with the notion that an on-reservation tribal retailer does not generally bear the legal incidence of the tax, the Kansas statute expressly exempts from those provisions any Native American retailer whose place of business is on the retailer's reservation. *Id.* § 79-3408c(c) (1997 & Supp. 2003).

Finally, the Kansas statute exempts from the tax the sale or delivery of fuel "for export from the state of Kansas to any

other state or territory or to any foreign country." Kan. Stat. Ann. § 79-3408(d)(1) (1997 & Supp. 2003). The apparent rationale for that exemption is that the sellers of motor fuel in another State or territory or in a foreign country are taxed by their respective government to maintain the roads within that jurisdiction. See *Kaul*, 970 P.2d at 66. Here, where the Tribe imposes a fuel tax on the sales of motor fuel within its jurisdiction, the same rationale reinforces the basis for finding the Kansas fuel tax inapplicable to sales or deliveries made to the Tribe on its Reservation.[8]

Given these structural characteristics of the Kansas motor fuel tax statute, the Kansas Supreme Court was certainly reasonable in concluding, under a "fair interpretation of the taxing statute as written and applied," *Chickasaw Nation*, 515 U.S. at 461-462, that Kansas has placed the legal incidence of the tax on the retailer.

3. In determining legal incidence, the court of appeals in this case followed its earlier decision in *Sac and Fox Nation*, which held that the Kansas taxing statute at issue here places the legal incidence of the tax on the distributor. See J.A. 117, 135. The court of appeals' analysis in *Sac and Fox Nation*, however, was flawed because it failed to give sufficient weight to the Kansas Supreme Court's interpretation of state law.

The Tenth Circuit correctly recognized that "the legal incidence of a tax does not always fall upon the entity legally

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[8] Under this Court's decisions beginning with *Montana* v. *United States*, 450 U.S. 544 (1981), a Tribe does not have plenary jurisdiction to tax within the borders of its reservation. A Tribe may not, for example, tax the activities of nonmembers on non-Indian fee land. See, *e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001). There is little doubt, however, that the Tribe here may tax retail sales of gasoline made at its own service station on the Reservation.

liable for payment of the tax" and that "the question is one of 'fair interpretation of the taxing statute as written and applied.'" 213 F.3d at 578. It also understood the Kansas Supreme Court in *Kaul* as "suggesting that the legal incidence of the Kansas motor fuel tax fell on the retailers where the distributors itemized the tax on retailers' bills as money due the State." *Id.* at 578-579. But the court refused to give any consideration, beyond a "but see" citation, to the state supreme court's interpretation of state law. *Ibid.*

Instead, the Tenth Circuit concluded that the legal incidence of the tax did not fall on the retailers because the Kansas law's pass-through provision is "permissive rather than mandatory," 213 F.3d at 579, noting that, "if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes, *id.* at 580. The court's conclusion is mistaken in at least three basic respects.

First, as explained above, the Kansas Supreme Court's determination respecting the operating incidence of the motor fuel tax under the Kansas statute is, at the very least, "consistent with the statute's reasonable interpretation," and should therefore be "deemed conclusive." *Gurley* v. *Rhoden*, 421 U.S. at 208. Yet the Tenth Circuit erred in failing even to inquire whether the Kansas Supreme Court's understanding of the state statute was reasonable.

Second, this Court's decisions do not hold that a State *must* require the distributor to pass through the tax in order to place the legal incidence on the retailer. Rather, *Mississippi Tax Commission* provides that a mandatory pass-through "establishes as a matter of law" that the legal incidence rests with the retailer. 421 U.S. at 608. As *Chickasaw*

Nation itself indicates, a court may still determine—based on a "fair interpretation of the taxing statute as written and applied" and without regard to that per se rule—that the legal incidence rests on the retailer. 515 U.S. at 461. See *Chemehuevi Tribe*, 474 U.S. at 11 (noting that the Court's cases do not suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the person liable for remitting the tax is required to pass on the tax to the purchaser).

Third, the court of appeals was in any event wrong in attaching the significance it did to its own perception that the Kansas statute does not "require[] distributors to include the amount of the fuel tax in their wholesale price." 213 F.3d at 580. The ultimate inquiry under this Court's cases is what the State intended with respect to the operative incidence of the tax. See *Mississippi Tax Comm'n*, 421 U.S. at 607-609. The Kansas Supreme Court made clear in *Kaul* that the Kansas legislature "*intended* that distributors pay the tax and include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers at the time the distributors deliver the motor fuel to the retailers. Therefore, Retailers are taxed * * * ." 970 P.2d at 67 (emphasis added).

In short, although the distributors are legally obligated to pay the tax, and thus serve as the State's "transmittal agent," *Chickasaw Nation*, 515 U.S. at 461-462, the Kansas Supreme Court has reasonably determined, in accordance with Kansas's overall motor fuel taxing scheme, that "[r]etailers are taxed." 970 P.2d at 67. The Tribe, as a retailer, therefore bears the "legal incidence" of the tax and, under *Chickasaw Nation*, is entitled to immunity from that tax. 515 U.S. at 459.

4. As *Chickasaw Nation* made clear, Kansas remains "free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. But it must do it in a way that alters, as a matter of substance and not merely as a matter of form or labels, what this Court has identified as the actual *legal incidence* of the tax. See *Mississippi Tax Comm'n*, 421 U.S. at 607-609.

Instead, the State must structure it levy so that the tax, as "written *and* applied," places the tax burden on the distributors. See *Chickasaw Nation*, 515 U.S. at 461 (emphasis added). The State might do so by, for example, taxing the receipt by the distributor alone rather than "the use, sale or delivery * * * for any purpose whatsoever," thereby removing any legal obligation for downstream retailers to pay the tax or to reimburse the distributor for the tax. See *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268, 272 (1975) (Stevens, J., dissenting). Or the State might chose some other equally effective means. But at present, the fair interpretation of the Kansas statute given it by the Kansas Supreme Court indicates that "[r]etailers are taxed," and that the legal incidence of the tax therefore remains on the Indian Tribe. See Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003); *Kaul*, 970 P.2d at 67. The judgment of the court of appeals should be affirmed on that logically antecedent ground.

B. Even If The Legal Incidence Of The Tax Is On The Distributor, The Tax Is Preempted By The Indian Trader Statutes Because It Is Imposed On The Sale Or Delivery Of Fuel To The Tribe On Its Reservation

If the Court concludes that the legal incidence of the Kansas motor fuel tax does in fact fall on the non-Indian distributor, that does not end the inquiry. To the contrary, even if the legal incidence for payment of the tax is on the distributor, it

remains the case that the tax is expressly imposed on the sale, use, or delivery of the fuel. See Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003). In this case, the non-Indian distributor sells the fuel to the Tribe and delivers the fuel to the Tribe at its on-reservation service station. That transaction between the distributor and the Tribe is thus the subject matter to which the tax is addressed. See pp. 12-16, *supra*. Imposition of the state tax on the sale in these circumstances therefore implicates the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, which Congress enacted pursuant to its express constitutional power to "regulate Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 3, Cl. 8, see *Wooster* v. *Georgia*, 31 U.S. (6 Pet.) 515 , 559, 561 (1832), and which trace back to 1790, Act of July 22, 1790, ch. 33, 1 Stat. 137. Those statutes govern trade between persons who sell goods to Indian Tribes or their members, and they have been held to preempt certain state taxes even where the legal incidence of the tax is on the trader.

1. This Court unanimously held in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), that the Indian Trader Statutes and implementing regulations prohibited the State of Arizona from imposing its gross proceeds tax on the operator of a federally licensed retail trading post located on the Navajo Reservation. The Court later ruled in *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980), that, under *Warren Trading Post*, the Indian Trader Statutes prohibited Arizona from imposing the same tax on the sale of farm machinery to an Indian Tribe when the sale took place on the reservation.

The Court in *Central Machinery* rejected the contention that *Warren Trading Post* could be distinguished on the ground that the non-Indian corporation that sold the farm

equipment did not reside on the reservation and had not been issued a license to trade with Indians. The Court held that "[t]he Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." 448 U.S. at 165. The Court found it "irrelevant that [the seller] is not a licensed Indian trader," noting that the sale of farm equipment at issue in that case "falls squarely within the language of 25 U.S.C. 264, which makes it a criminal offense for '[a]ny person to introduce goods, or to trade' without a license 'in the Indian country or on any Indian reservation.'" 448 U.S. at 164-165. It is the existence of the Indian trader statutes, then, and not their administration," the Court explained, "that preempts the field of transactions with Indians occurring on reservations." *Id.* at 160 (footnote omitted). Under the rule set out in *Central Machinery*, the state tax here is similarly preempted insofar as it is imposed on the delivery and sale of motor fuel to the Tribe on its Reservation, even though (as we have been informed by the Department of the Interior) the non-Indian distributor in this case does not have a license to trade with the Tribe.[9]

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[9] The sale in this case would presumably be governed by the Uniform Commercial Code, either as a matter of state law or tribal law. The Kansas Uniform Commercial Code defines a "sale" as "the passing of title from the seller to the buyer for a price" and provides that "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." Kan. Stat. Ann. §§ 84-2-106(1), 84-2-401(2) (1996). It appears in this case that the sale of motor fuel by the distributor to respondent Tribe occurs upon completion of the distributor's obligation to tender delivery at the Tribe's service station on the Reservation. Under such an arrangement, the sale takes place on the Reservation for purposes of the application of the Indian Trader Statutes.

2. The Tenth Circuit, in its prior decision in *Sac and Fox Nation*, appeared to recognize that application of the Kansas motor fuel tax to sales to Indian Tribes on their reservations was problematic under *Warren Trading Post* and *Central Machinery*. See 213 F.3d at 581. The Tenth Circuit incorrectly concluded, however, that *Central Machinery* had been undermined by this Court's decision in *Department of Taxation and Finance* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994), which, the Tenth Circuit said, had "narrowed" the interpretation of the Indian Trader Statutes. 213 F.3d at 582-583.

In *Milhelm Attea*, the State of New York imposed what the Court accepted as a *valid* tax on non-Indian consumers who purchased cigarettes at tribally operated stores on Indian reservations in that State. The question was not the validity of the tax *vel non*, but whether the Indian Trader Statutes barred New York from imposing certain record-keeping and other requirements on non-Indian wholesalers, who were licensed Indian traders and who sold cigarettes to the on-reservation tribal retailers, in order to prevent circumvention of the "concededly lawful" tax imposed on the ultimate consumer. 512 U.S. at 75 (quoting *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 61, 482-483 (1976)). The Court held that the Indian Trader Statutes did not require the facial invalidation of the state statutory provisions that imposed those regulatory burdens on the non-Indian traders. See 512 U.S. at 73-78. In the course of its analysis, the Court recited the holdings in *Warren Trading Post* and *Central Machinery*, without suggesting that either decision had lost its precedential force. See *id.* at 70-71, 74-75.

This case, in contrast to *Milhelm Attea*, involves the antecedent question whether the state tax, if imposed on the distributor with respect to its on-reservation sales to an Indian Tribe, is lawful, or is instead preempted by the Indian Trader Statutes. That question is analytically distinct from the question whether the Indian Trader Statutes bar the imposition of certain ancillary regulatory burdens on an Indian trader in connection with the collection of a concededly lawful tax imposed on non-Indian customers of an Indian trader.

Indeed, the Court itself drew that very distinction in *Milhelm Attea*. The Court explained that "[t]he specific kind of state tax obligation that New York's regulations are designed to enforce—which falls on non-Indian purchasers of goods that are merely retailed on a reservation—stands on a markedly different footing from *a tax imposed directly on Indian traders*, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.'" 512 U.S. at 73 (quoting *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156-157 (1980))(emphasis added). Elsewhere in its opinion, the Court reiterated that "[t]he state law [it] found pre-empted in *Warren Trading Post* was a tax directly 'imposed upon Indian traders for trading with Indians.'" 512 U.S. at 74 (quoting 380 U.S. at 691). It cited *Central Machinery* for the same proposition. 512 U.S. at 74 (citing 448 U.S. at 164). "That characterization," the Court continued, "does not apply to regulations designed to prevent circumvention of 'concededly lawful' taxes owed by non-Indians." *Id.* at 74-75.

If the Court concludes that the legal incidence of the Kansas motor fuel tax is on the distributor, then this case, like *Warren Trading Post* and *Central Machinery*, involves "a tax directly imposed upon Indian traders for trading with Indians." *Milhelm Attea*, 512 U.S. at 74 (internal quotation marks omitted). To be sure, in this case, unlike *Warren Trading*

Post and *Central Machinery*, the sales are made to the Tribe for subsequent sale of the gasoline at retail to customers who include a significant percentage of non-Indians at the Tribe's service station. But the Court in *Milhelm Attea* did not question the proposition that the Indian Trader Statutes apply to non-Indian wholesalers who trade with Indians or Indian Tribes.[10]

This case would stand on a different footing if the Indian retailer—whether a Tribe or a tribal member—that purchased motor fuel from a non-Indian distributor merely sought to take advantage of an immunity from state taxation by selling the gasoline at retail at a greatly reduced price that effectively marketed that immunity. In that situation, the retailer, even if the Tribe itself, would not be advancing any sovereign interest of the Tribe, but would merely be enabling its customers to avoid the payment of the taxes of another sovereign. There is no reason to extend the preemptive effect of the Indian Trader Statutes to that situation, where the Tribe or tribal member is merely "market[ing] an exemption from state taxation." *Confederated Tribes of Colville Reservation*, 447 U.S. at 155; see *id.* at 155-157.

In this case, however, the Tribe, in its sovereign capacity, imposes its own motor fuel tax on sales at the service station.

[10] Indeed, the Court specifically pointed out that the Interior Department had issued Indian trader licenses to 64 wholesalers in the State of New York. See 512 U.S. at 74 n.10. The Indian Trader Statutes are designed to protect the Indians and Indian Tribes, and *Warren Trading Post* and *Central Machinery* make clear that state taxes imposed on non-Indians for their trade with Indians are preempted by those Statutes where they would unduly interfere with distinct and substantial interests of the Indians. As explained in the text, imposition of the state taxes at issue here have that effect and therefore are preempted.

The fuel is sold at fair market price, the rate of the Tribe's tax is roughly comparable to the tax imposed by the State, and the proceeds of the tax are dedicated to the building and maintenance of roads on the Reservation in the same manner as Kansas and other States, as well as the federal government, collect and spend fuel taxes for such purposes. See J.A. 133-134, 141-143. If the State were permitted to impose its motor fuel tax on sales to the Tribe, the Tribe would be effectively deprived of the tax base that other sovereigns use to fund important government activities. See J.A. 142. In these circumstances, where the Tribe is not merely marketing an exemption from state taxation, but has asserted a distinct and substantial sovereign interest in the matter, the Indian Trader Statutes, as construed in *Warren Trading Post* and *Central Machinery*, preempt the state tax. Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 186 (1989) (noting that the state severance tax in that case did not "impose a substantial burden on the Tribe").

This Court held in *Colville* that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U.S. at 152. The Court reiterated that holding in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), explaining that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management," and "enables a tribal government to raise money for essential services." The essential services here concern the building and maintenance of roads, which are open to Indians and non-Indians alike.

Recent federal reports convincingly demonstrate the importance of the tribal interest at stake. Indian reservation roads are in very poor condition, which affects not only driving safety, but also the ability to furnish emergency medical, fire, and police services on an expedited basis, transportation to schools and jobs, and the advancement of economic activity that is critical to tribal self-sufficiency.[11] To address those problems, the Department of the Interior recently promulgated extensive regulations to implement the Indian Reservation Roads Program. See 69 Fed. Reg. 43,090 (2004); 25 C.F.R. Pt. 170. Those regulations are devoted to enhancing the ability of tribal governments to address the condition of roads on their reservations, the expenditure of federal funds dedicated to that purpose, and the ability of Tribes to assume responsibility for the expenditure of those funds under self-determination contracts. The regulations also contemplate that Tribes may supplement funds received from the federal government with their own revenues, specifically including a "tribal fuel tax." 25 C.F.R. 170.932(d). The federal government and the Tribe share an important and convincingly articulated interest in raising revenues to support reservation roads. Indeed, the State of Kansas is a beneficiary of that interest because the roads that the Tribe builds and maintains through the use of its tax revenues are within the State as

[11] The number of fatal motor vehicle crashes on Indian reservations has *increased* 52.5% (one third involving non-Indians) during a period in which the nationwide number has decreased 2.2%. See U.S. Dep't of Transp., *Fatal Motor Vehicle Crashes on Indian Reservations 1975-2002*, Rep. No. DOT HS 809-727, at 3, 21 (April 2004). See generally Bureau of Indian Affairs, *Transportation Serving Native American Lands* (May 2003); see also S. Rep. No. 406, 106th Cong., 2d Sess. 1-6, 9, 11 (2000).

well as the Reservation, and they are open to the non-Indian as well as the Indian citizens of the State.

C. The Court Should Continue To Employ The Balancing Of Interests Test In Evaluating State Taxes That Burden Indian Tribes But Whose Legal Incidence Does Not Rest On The Tribes

This Court reaffirmed in *Chickasaw Nation* that, if the legal incidence of a tax implicating Indian interests rests on a non-Indian, then a court must weigh the respective federal, state, and tribal interests to determine whether the State may impose the levy. See 516 U.S. at 459. For the reasons already explained, there is no need to apply that test in this case. If the Court did undertake a balancing test, all the foregoing considerations would weigh in the Tribe's favor. But more fundamentally, this Court certainly should not embrace petitioner's suggestion (Br. 21-33) that the Court *jettison* the balancing-of-interests test, which provides a sensible and settled approach to determining Indian tax immunity. See *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-145 (1980); *Colville*, 447 U.S. at 154-157.

Petitioner makes much of the notion that its proposed bright-line rule—which would categorically allow any ostensible "off-reservation" tax on non-Indians regardless of its impact on Indian Tribes so long as Congress has not expressly preempted it—has the virtue of simplicity. But the Court considered and rejected that approach in developing the balancing-of-interests test. See *Colville*, 447 U.S. at 176-186 (Rehnquist, J., concurring and dissenting). And since that time, the Court has decidedly found undesirable similar bright-line rules in cases in which state taxes may potentially impinge on tribal interests. See, *e.g.*, *Cotton Petroleum Corp.*,

490 U.S. at 176 (Instead of a "mechanical or absolute test," the Court has "applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'") (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982)). This Court's balancing-of-interests test rightly recognizes that it is essential to consider, even when the legal incidence of a state tax rests on non-Indians, whether the tax nevertheless places an undue burden on the Tribe.

Petitioner's rule would also broadly disrupt, at a practical level, the complex relationships that have developed between the federal government, the States, and the Indian Tribes on a wide variety of issues. Following this Court's advice, States and Indian Tribes have entered into intergovernmental tax agreements addressing areas of mutual concern. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991)("States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 48 Stat. 987, as amended, 25 U.S.C. § 476."); see also Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes*, 78 Or. L. Rev. 501, 546 (1999) (noting that "[m]ore than 200 Tribes in eighteen states have resolved their taxation disputes by entering into intergovernmental agreements"). Many of those recent, post-*Chickasaw Nation* agreements specifically address the issue of fuel taxes and provide for an equitable allocation of reservation-generated revenues.[12]

[12] See *e.g.*, Fort Peck - Montana Gasoline Tax Agreement (Mar. 24, 1992); Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002); Motor Fuels Contract Between the State of Oklahoma and the Seneca-Cayuga Tribe of Oklahoma (Feb. 10, 2004); Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the Nisqually Indian Tribe and the State of Washington (Sept. 18, 2001); Amended Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (Mar. 9, 2004); Agreement for the Collection and Dissemination of Motor Fuels Taxes Between the State of Nebraska and the Winnebago Tribe of Nebraska (Jan. 24, 2002).

If the Court were to discard what it recently described as "settled law," *Chickasaw Nation*, 515 U.S. at 453, the foundation for those constructive intergovernmental agreements would be undermined. State and tribal governments have undertaken serious cooperative efforts to address a matter of vital interest to the federal, state and Indian governments —the generation of revenue, through the traditional method of motor fuel taxes, for construction and maintenance of Indian reservation roads. See J.A. 141-142; see note 12, *supra*. If the Court were to jettison its established methodology for evaluating the propriety of state taxes, the consequences for intergovernmental cooperation in the case of fuel taxes—as well as many other areas—could be far-reaching.

Ultimately, there is neither need nor warrant for the Court to disrupt those cooperative efforts. The state tax at issue here cannot be imposed on the Tribe for the same reason that the state tax in *Chickasaw Nation* was impermissible—the State has improperly placed the legal incidence of the motor fuel tax on the Tribe. In any event, the state tax at issue here would be preempted by the Indian Trader Statutes. The Court should affirm the court of appeals' judgment on that basis and leave it to the State to properly alter the legal incidence of its tax, if it so desires, in accordance with this

Court's decisions. Alternatively, of course, the State and the Tribe remain free to resolve this and other tax issues by mutual agreement, as they did in a formal agreement that was in effect between 1992 and 1997.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JOAN WAGNON, IN HER OFFICIAL CAPACITY AS SECRETARY, KANSAS DEPARTMENT OF REVENUE,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NCAI, CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION, PUEBLOS OF ISLETA, SANDIA AND ZIA, SISSETON WAHPETON SIOUX TRIBE, SKULL VALLEY BAND OF GOSHUTE INDIANS, TULALIP TRIBES, AND WINNEBAGO TRIBE OF NEBRASKA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	1
THE ORIGINS AND EVOLUTION OF INDIAN PREEMPTION DEMONSTRATE THAT KANSAS MAY NOT IMPOSE ITS TAX ON FUEL SOLD TO A TRIBE	6
A. The Principles Underlying Federal Preclusion Of State Taxes Infringing Tribal Sovereignty And Burdening On-Reservation Commerce	6
B. Kansas's Tax Is Invalid	13
1. Kansas's Claim That State Taxes Infringing Tribal Sovereignty Are Valid Unless Expressly Preempted Ignores History And The Actual Interests At Stake Here	13
2. Kansas's Claim That Its Tax Is Valid Because It Is Formally Imposed On An Off-Reservation Act Is Wrong	18
3. Kansas's Balancing Derogates The Federal And Tribal Interests At Stake	22
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Cabazon Band of Mission Indians v. *Wilson*, 37 F.3d 430 (9th Cir. 1994) 25, 26
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 11
Carpenter v. *Shaw*, 280 U.S. 363 (1930) 19
Central Mach. Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980) 20, 21
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 8
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989) 17, 18, 24
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 16, 20, 22
Department of Taxation & Fin. v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994) 14, 20, 25
Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 15
Hoopa Valley Tribe v. *Nevins*, 881 F.2d 657 (9th Cir. 1989) 26
Japan Line, Ltd. v. *County of L.A.*, 441 U.S. 434 (1979) 16, 17
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 9
Maricopa & Phoenix R.R. v. *Territory of Ariz.*, 156 U.S. 347 (1895) 25
McClanahan v. *State Tax Comm'n*, 411 U.S. 164 (1973) 11
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 17, 23
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 25
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 12, 15, 23, 24, 27

TABLE OF AUTHORITIES – continued

Page

Oklahoma Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) 11, 20
Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 28
Ramah Navajo Sch. Bd. v. *Bureau of Revenue*, 458 U.S. 832 (1982) 12, 14, 20, 24, 28
Rice v. *Olsen*, 324 U.S. 786 (1945) 9
Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 17
Thomas v. *Gay*, 169 U.S. 264 (1898) 9, 25
Trinova Corp. v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991) 22
United States v. *43 Gallons of Whiskey*, 93 U.S. 188 (1876) 7
United States v. *Kagama*, 118 U.S. 375 (1886) 9
United States v. *McBratney*, 104 U.S. 621 (1881) 9
United States v. *Wheeler*, 435 U.S. 313 (1978) 6
Utah & N. Ry. v. *Fisher*, 116 U.S. 28 (1885) 9
Wagoner v. *Evans*, 170 U.S. 588 (1898) 25
Washington v. *Confederated Tribes of the Colville Indian Res.*, 447 U.S. 134 (1980) 12, 14, 24, 25
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 3, 12, 20, 24
Williams v. *Lee*, 358 U.S. 217 (1959) 9
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 7, 8

CONSTITUTION, STATUTES AND REGULATION

U.S. Const. art. I, § 8, cl. 3 4
23 U.S.C. § 135 27
25 U.S.C. §§ 461-479 26
25 U.S.C. § 450f *et seq.* 26

TABLE OF AUTHORITIES – continued

Page

Kan. Stat. Ann. §§ 79-3402 28
Kan. Stat. Ann. §§ 79-34,142 ..... 28, 29
25 C.F.R. § 170.932(d) 27

LEGISLATIVE HISTORY

33 J. Cont. Cong. 453-63 (Aug. 3, 1787) 7

SCHOLARLY AUTHORITIES

Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922 (1999) 18
F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 4, 7, 10
R. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995) 7, 8

OTHER AUTHORITIES

The Federalist, No. 42 (Madison) (C. Rossiter ed., 1961) 7
J. Madison, *Journal of the Federal Convention* (E. Scott ed., 1898) 7

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages, including *amici* Confederated Tribes of the Warm Springs Reservation, Pueblos of Isleta, Sandia, and Zia, Sisseton Wahepeton Sioux Tribe, Skull Valley Band of Goshute Indians, Tulalip Tribes, and Winnebago Tribe of Nebraska. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. This case calls for the straightforward application of longstanding principles regarding federal preemption of state taxes that substantially infringe tribal sovereignty. Kansas, however, urges this Court to embark on a wholesale revision of these principles and advocates a rule of law that would thwart federal and tribal interests in tribal sovereignty and economic self-sufficiency. *Amici* have a strong interest in opposing the abandonment of time-honored principles of Indian law and in preventing the infringement of tribal sovereignty Kansas seeks to work in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1995, Kansas imposed an excise tax on motor fuel sold or delivered in the State. Pursuant to an agreement with the Prairie Band Potawatomi Nation ("Tribe"), Kansas did not tax the motor fuel sold or delivered to the Tribe for the station on its reservation. In 1995, however, Kansas amended its Motor Fuel Tax Act to place the legal incidence of the tax on distributors, and now seeks to enforce that tax on motor fuel sold or delivered to the Tribe's on-reservation gas station.

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[1] No persons or entities other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

Imposition of the tax on fuel sold to the Tribe would deprive the tribal government of all fuel tax revenues currently used by the tribal government to fund and maintain reservation roads. Although reservation roads are essential to reservation economies, educational systems, health care and virtually all aspects of reservation life, these roads are generally in miserable condition, resulting in a far greater number of automobile accidents and fatalities than occur in comparable areas outside of Indian country. The federal government has a comprehensive regulatory structure addressing reservation roads, but federal funding is woefully inadequate. The states, moreover, who receive federal funding for their own roads that fall within reservations, frequently shirk their obligation to improve or maintain these roads and instead siphon off the funds for use elsewhere. The Tribe's fuel tax, whose revenues are exclusively dedicated to reservation roads, seeks to address the glaring need to improve the Tribe's transportation infrastructure – an important governmental function that federal reservation-roads regulations specifically envision the tribes will discharge.

The tribal government's ability to act as a responsible sovereign vis-à-vis reservation roads would be wholly abrogated by enforcement of the Kansas tax on fuel delivered to the Tribe. If both state and tribal taxes were imposed, the high tax burden would price the Tribe's fuel out of the market. Pet. App. 12. Moreover, the Tribe is not marketing a tax exemption (its tax is roughly equivalent to the state tax), see JA 134. Its station sells motor fuel primarily to the customers and employees of the Tribe's casino, and thus is an "integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 8, 3. Equally to the point, pursuant to tribal law, all tribal motor fuel tax revenues are expended to improve roads in Kansas. The sole consequence of the tribal taxing authority, accordingly, is a more equitable distribution of revenues for road maintenance in Kansas.

In sum, the Kansas tax on fuel sold to the Tribe would annul the Tribe's taxing authority and its ability to fulfill its sovereign responsibility to fund and maintain reservation roads. It is, accordingly, preempted.

Kansas contends that none of this matters. Kansas first claims that no matter what its effect on the Tribe, the tax is lawful unless Congress expressly preempts it. In addition, Kansas asserts – again no matter what its effect on the Tribe – that the tax is lawful because its formal incidence falls off-reservation. Finally, Kansas argues that even if this Court's established balancing test is applied, see *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the State always wins the balancing game if its tax serves a valid state purpose and is imposed off-reservation. But, Commerce Clause jurisprudence generally, including Indian Commerce Clause jurisprudence specifically, has always focused on the real interests at stake for *all* sovereigns involved.

Indeed, every error in Kansas's analysis can be traced to its failure to understand or appreciate the constitutional and historic origins of this Court's Indian Commerce Clause jurisprudence, and hence the origins of the balancing test. If this Court were to adopt either of the two bright-line tests that Kansas endorses (express preemption and formal incidence) or Kansas's application of *Bracker* balancing, Indian preemption law would become wholly divorced from its historic and constitutional roots, interests and purposes. Our constitutional structure and history recognize the overlapping interests of three different sovereigns in Indian preemption cases. In such cases, any legal test applied to determine the validity of state regulation must respect those interests; and that respect, not an ahistoric simplicity, is the hallmark of proper legal analysis in this setting.

Part I.A. sets forth the origins and the evolution of this Court's test balancing the interest of all three sovereigns in determining whether a state tax is preempted. By adopting the Constitution, Kansas, like other States, delegated to

Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. From the earliest days of the Republic, the Indian Commerce Clause, in conjunction with the United States' trust responsibility to the tribes, has been interpreted to give the federal government broad power over tribal Indians, tribal land, and tribes. F. Cohen, *Handbook of Federal Indian Law* 212-16 (1982 ed.). But the Indian Commerce Clause and the United States' trust responsibility do not merely authorize the United States to exercise authority over the Indian Tribes. They incorporate into our constitutional structure a recognition of both the tribes' sovereignty and the United States' unique obligation to the tribes.

As a result of these constitutional and historic roots, federal preemption of state regulations or taxes infringing tribal sovereignty and burdening tribal commerce has two aspects: First, federal law may preempt the state regulation at issue, either expressly or because federal and tribal interests outweigh the relevant state interests. Second, state law that unduly infringes tribal sovereignty is prohibited. These tests recognize that an Indian tribe, like a state or foreign state, possesses sovereign authority – an authority that inherently limits other sovereigns' ability to impose burdens on or infringe a tribe's authority. The limits are not identical to those arising from the sovereignty of a state or foreign state, but are the distinctive consequences of the tribes' status as domestic dependent nations subject to the United States' authority and under the United States' protection.

Part I.B. relies on the fundamental principles underlying Indian preemption to demonstrate that the legal rules proposed by Kansas are utterly inconsistent with the constitutional and historic foundations of Indian Commerce Clause preemption law. Kansas's first request – that the Court jettison the balancing test for express preemption – wholly ignores that a tribe is not merely a market participant,

but a sovereign whose inherent authority to tax in order to fulfill its sovereign responsibilities with respect to reservation roads is entitled to respect and protection. Forcing a tribe to run to Congress for protection from every state regulation that infringes upon its sovereignty – no matter how severe the infringement – is entirely inconsistent with the tribes' status in our constitutional system, in addition to being wholly unworkable. The test for federal preclusion of state regulation affecting the tribes must take legitimate tribal interests into account, which an express preemption test fails to do.

Second, Kansas's claim that the balancing test should not apply because the legal incidence of its tax falls on off-reservation conduct both mischaracterizes the Kansas tax, which in truth attaches to the on-reservation delivery of fuel, and misunderstands the relevant constitutional inquiry. The pertinent question is not the formal incidence or geography of the transaction taxed, but the effect of the regulation on the interests of federal, tribal and state sovereigns. The state regulation cannot stand if it substantially infringes tribal sovereignty (here, the sovereign power to tax value generated on the reservation to fund and maintain reservation roads). The State's manipulation of legal incidence – without changing the tax's forbidden impact – treats state taxation of tribes in Indian country as a game in which the label is dispositive and the effect of the tax on tribal self-government is irrelevant. That has never been the law under any of the Commerce Clauses; instead, this Court's legal tests protect the sovereign interests implicated by overlapping jurisdiction.

Finally, Kansas's version of the Court's balancing test would make balancing a meaningless exercise because federally-protected tribal sovereignty, and concomitant federal and tribal interests, would be accorded no weight. The State erroneously contrasts its interests as arising from its status as sovereign with the Tribe's interests as supposedly arising only from a desire to increase profits. But, the state

tax would nullify tribal taxing authority and significantly obstruct the federal interest in tribal self-determination with respect to taxes, governmental functions (here the funding and maintenance of a safe and viable transportation infrastructure), and other economic activities. It should be dispositive here – under both the balancing test and the infringement test – that enforcement of the state tax would wholly preclude the Tribe from exercising its sovereign authority to tax sales of motor fuel at its on-reservation station, and thereby to fund the very reservation roads that only the Tribe has demonstrated a commitment to maintain.

This is not a case, finally, where the impact of the state tax is speculative or remote: The state tax is passed through to the Tribe in its entirety; and the impact of the lost revenues is substantial for the Tribe (but would be trivial to the State if its tax were invalidated). The federal and tribal interests at stake overwhelm the State's interest in collecting the tax on distributions to the Tribe.

ARGUMENT

THE ORIGINS AND EVOLUTION OF INDIAN PREEMPTION DEMONSTRATE THAT KANSAS MAY NOT IMPOSE ITS TAX ON FUEL SOLD TO A TRIBE.

A. The Principles Underlying Federal Preclusion Of State Taxes Infringing Tribal Sovereignty And Burdening On-Reservation Commerce.

This Court has recognized the Indian Commerce Clause, in conjunction with the federal treaty power, as the source of plenary federal power over Indian affairs. See, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978). The Indian Commerce Clause, however, is not simply a constitutional supplier of federal power over the tribes. The Framers intended it to serve as a barrier to state authority that infringes upon tribal sovereignty on the reservation.

During the colonial period, the tribes were recognized as sovereigns, governing their own territories. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). Under international law, however, the British Crown's "discovery" of the tribes and tribal land gave the Crown power over the tribes' external relations. *Id.* at 543-44. When the United States declared independence, the Crown's rights were passed to the colonies. The Articles of Confederation, however, were wholly unclear about whether, and the extent to which, the *states* or *the United States* had succeeded to the Crown's discovery rights. See R. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1097-98 (1995) (legal history of federal-state conflict during this period). Several colonies took the position that they had inherited the powers of the British Crown with respect to tribes within their boundaries.

Experience under the Articles demonstrated to the Constitutional Convention of 1787 that exclusive federal control over Indian policy was necessary. Separate states' actions routinely created serious conflicts and threats of war with powerful tribes. See 33 J. Cont. Cong. 453-63 (Aug. 3, 1787). With little debate, accordingly, the Constitution gave the federal government exclusive power over Indian affairs. See J. Madison, *Journal of the Federal Convention* 654-56 (E. Scott ed. 1898); *The Federalist No. 42*, at 268 (Madison) (C. Rossiter ed., 1961) ("[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory"). Once the Constitution was enacted, states ceased to have jurisdiction vis-à-vis tribes and tribal lands except as provided by Congress. See Cohen, *supra*, at 388; *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

Federal exclusivity (and the corollary of state exclusion from Indian policy) was reflected in the early decisions of this Court. In *Worcester*, for example, Chief Justice Marshall addressed the constitutionality of a Georgia law requiring

non-Indians to obtain a state license to visit or work in the Cherokee Nation. The Court invalidated the law on several grounds, including its inconsistency with the Indian Commerce Clause, which this Court held excluded states from the regulation of Indian affairs. The opinion described the "discontents and confusion" resulting from the divided federal-state authority over Indian affairs under the Articles of Confederation, and explained that the Constitution threw off "[t]he shackles imposed on [federal] power, in the confederation." 31 U.S. (6 Pet.) at 559. The Georgia law was thus invalidated because it "interfere[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed *exclusively to the government of the union*." *Id.* at 561 (emphasis supplied). See also *id.* at 580-81 ("the regulation of commerce among the Indian tribes . . . . must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations") (M'Lean, J., concurring).

"A clearer and more forceful assertion of the dormant Indian Commerce Clause is hard to imagine." R. Clinton, *supra*, at 1173. See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831) (describing the Indian Commerce Clause as the source of the exclusivity of federal power over Indian affairs). As the Court's early cases reflect, the Constitution's exclusive grant of Indian commerce power to Congress prevented states from exercising authority over Indian affairs, including over non-Indians who dealt with tribes. Federal statutory enactments, accordingly, were not necessary to preclude state regulation.

In the years that followed, the Court regularly rejected state claims of inherent authority over Indian affairs. For example, when Kansas sought to tax the tribal lands of the Shawnee, this Court held that the United States' continuing recognition of the Shawnee as a tribe necessarily excluded Kansas's exercise of taxing authority over the tribal lands so "long as

the United States recognizes [the tribe's] national character." *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1866). See also *United States* v. *Kagama*, 118 U.S. 375 (1886) (sustaining Congress's authority under the federal trust obligation to enact the Major Crimes Act punishing Indians who committed serious offenses in Indian country, and explaining why states lacked any concomitant authority).

It is critical to note, however, that the Indian Commerce Clause completely excluded state regulatory authority without assessment of countervailing state interests only where tribes were involved in or directly and concretely affected by the transactions that the state sought to regulate. Thus, in *United States* v. *McBratney*, 104 U.S. 621 (1881), the Court sustained Colorado's authority to prosecute a non-Indian for the murder of another non-Indian even though the murder occurred on the Ute reservation. And, in *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (1885), the Court upheld a territorial tax on a railway's right-of-way through an Indian reservation, explaining that "[t]he authority of the Territory may rightfully extend to all matters not interfering with [federal provisions for the tribe's] protection." *Id.* at 31. See also *Thomas* v. *Gay*, 169 U.S. 264 (1898) (upholding Oklahoma tax on cattle owned by non-Indians but grazed in part on Indian land, because the tax was not imposed on the tribe's rental income or contract, but only on the cattle; thus its effect was too remote to interfere with Indian commerce).

As matters stood by the mid-20th century, then, states were empowered to exercise general regulatory authority, including taxing authority, over transactions not involving, or only remotely affecting, tribes, even if those transactions took place in, or had some connection with, Indian country. But, federal authority was exclusive with respect to transactions directly or concretely affecting tribes in Indian country. See *Rice* v. *Olsen*, 324 U.S. 786, 789 (1945) ("[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court gave voice to one of the modern tests for assessing assertions of state jurisdiction in light of these principles. There, the Court announced that the Arizona courts lacked jurisdiction over a non-Indian's claim against a Navajo seeking to collect for goods sold on the reservation. The Court relied on the United States' treaty with the Navajo, but also relied on *Worcester*, and thus on the Indian Commerce Clause and the federal trust obligation, for the proposition that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 219-20. In essence, this Court read the Constitution and its precedent to protect the exclusivity of federal authority over Indian affairs *and* tribal sovereignty from state infringement.

From the inception of our Republic, Congress has regularly exercised its broad authority over Indian affairs, altering the content of federal Indian policy in ways that have dramatically affected the scope of tribal sovereignty. Throughout that journey from isolation, to allotment, to assimilation, to self-determination and economic self-sufficiency, however, the tribes have retained their status as sovereigns, exercising those inherent powers of sovereignty consistent with the Congress's Indian policy of the time. See, *e.g.*, Cohen, *supra*, at 239-40.

Critically here, in the past three decades, federal Indian policy has led to increasing interaction among tribes and non-Indians, with the result that federal, tribal and state interests are implicated in more and more areas subject to regulation. The increasing overlap in sovereign interests has required the Court to consider and accommodate all three sovereigns' interests in an increasing number of cases. In order to do so, the Court has synthesized the various strands in its analysis of the validity of state regulation that affected tribal Indians in Indian country – the enforcement of preemptive federal power, the protection of tribal sovereignty from infringement,

and the recognition that states have certain valid interests affected by activities in Indian country.

The Court has continued, of course, to enforce federal law with express preemptive effect. See, *e.g.*, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 165 (1973); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 (1987). And, the Court has continued, in the vein of *Williams*, to flatly forbid state regulation that frustrates tribal self-government. *McClanahan*, 411 U.S. at 170. See *id.* at 173 (Indian tribes are "'regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided'"). But, in addition to assessing whether state regulations that are not expressly preempted frustrate tribal self-government, the Court's increasing need to accommodate tribal sovereignty, its federal protection, and state interests has given rise to the current balancing approach for assessing the validity of state regulation, including taxation, affecting Indian country.

Under this approach, direct state taxation of tribal Indians and tribes for on-reservation activities is flatly forbidden absent express congressional authorization, because in that setting, federal and tribal interests *always* outweigh the contravening state interest. See *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458 (1995). Importantly, however, in analyzing the validity of state taxes on *non-Indians*, the Court, separate and apart from the *Williams* infringement test, balances the legitimate interests of the affected sovereigns (the United States, the tribe and the state) to determine whether the tax has an unlawful effect in Indian country. Through this test, the Court gives continuing effect to the Indian Commerce Clause and its historic purpose to

protect the legitimate sovereign interests of the tribes and their federal protector.

Bracker states the modern test for determining whether state regulation of non-Indians should be invalidated and the principles supporting that test:

> [C]ongressional authority [under the Indian Commerce Clause] and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. [448 U.S. at 142-43 (citations omitted).]

The Court has thus "rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required." *Id.* at 143. See also *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982) ("federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity").

The Court has also determined that a state law's validity is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty, but [. . .] call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. See also *Washington* v. *Confederated Tribes of the Colville Indian Res.*, 447 U.S. 134, 154-157 (1980); *New Mexico* v. *Mescalero Apache*

Tribe, 462 U.S. 324 (1983) (preempting state wildlife regulation and licensing fees on non-Indians on reservation). This inquiry is required to ensure that competing sovereign interests are all given due respect.

In sum, in addition to being the constitutional source of the broad federal power over Indian tribes, the Indian Commerce Clause is a reservation of areas of exclusive federal authority from which state regulation is excluded to serve the federal interests in protecting tribal sovereignty and fulfilling the federal trust obligation. The Court has limited the area of exclusivity, allowing state regulation (including taxation) that does not substantially infringe federal interests and tribal sovereignty. But, in light of the constitutional origins of this Court's jurisprudence, it would be a revolutionary change in the law, not warranted by any showing of need, to eliminate either the *Williams* infringement or the *Bracker* balancing test – tests which take federally-protected tribal interests into account to give content to the Indian Commerce Clause and the trust obligation embodied in our constitutional plan.

B. Kansas's Tax Is Invalid.

1. Kansas's Claim That State Taxes Infringing Tribal Sovereignty Are Valid Unless Expressly Preempted Ignores History And The Actual Interests At Stake Here.

Kansas contends that *Bracker* balancing is administratively unworkable and must be replaced with a bright-line test of express preemption. This Court has already rejected the argument. In any event, an express preemption test would sever all ties between the constitutional origins and principles of Indian preemption and modern jurisprudence in this area.

First, Kansas's quest to subject Indian commerce to plenary state control absent express preemption is not new. Twenty-five years ago, an effort to achieve Kansas's goal was emphatically rejected by this Court. In *Colville*, several Indian tribes challenged the legality of Washington's taxes on

cigarette sales by Indian retailers and on motor vehicle use in Indian country, asserting that these taxes violated the Indian Commerce Clause and the Supremacy Clause. 447 U.S. at 139-41. The United States argued that the tribes' Commerce Claims were "insubstantial," because the Court had previously decided that the Indian Commerce Clause was "'without force in situations like the present.'" *Id.* at 148.

Colville rejected the United States' position. This Court held that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 156. In balancing those legitimate concerns, the Court explained that although "the Indian Commerce Clause, of its own force, [does not] automatically bar[] all state taxation of matters significantly touching the political and economic interests of the Tribes," the Clause nonetheless has a continuing "role to play in *preventing undue discrimination against, or burdens on, Indian commerce*." *Id.* at 157 (emphasis supplied).

Colville, thus, explicitly refused to adopt the express-preemption test advocated by Kansas and instead reaffirmed that balancing of federal, tribal and state interests is required to determine whether state regulation infringing tribal sovereignty is valid under the Indian Commerce Clause. See also *Ramah*, 458 U.S. at 843 (the state's argument that "imposition of the state tax is not pre-empted because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority... is clearly foreclosed by our precedents") (citing cases). The Court recently utilized the balancing test to address the validity of a state tax on a non-Indian, see, *e.g.*, *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 73-75 (1994). Kansas has not come close to producing a "compelling justification" for departing from *stare decisis* in this area, where the Court's decisions are subject to

congressional revision. See *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Second, Kansas's proposed rule is divorced from the historic underpinnings of the Indian Commerce Clause. The Clause did not simply grant authority to the federal government. As Part A makes clear, the Indian Commerce Clause addressed the problems created by the dual authority over Indian affairs under the Articles of Confederation by reserving an area of exclusive federal authority and excluding state regulation from that area. Federal exclusivity was deemed necessary to serve the federal interests in protecting tribal sovereignty and fulfilling the federal trust obligation. From this inception until today, the Court has always recognized the constitutional basis for the protection of tribal sovereignty and the necessary accommodation of federal, state and tribal interests. Indian law preemption respects "'[t]he unique historical origins of tribal sovereignty, and the federal commitment to tribal self-sufficiency and self-determination.'" *Mescalero*, 462 U.S. at 334.

Acceptance of Kansas's crabbed express-preemption test would entirely exclude tribal-sovereignty interests from the Indian Commerce Clause analysis, and thus turn a blind eye to the Court's precedent and the Framers' intent. States could enact taxes that would devastate tribal governments and enterprises, and the tribes would be forced to lobby Congress for an express exemption each time such a tax was enacted in any state. That – and not the *Bracker* balancing test – is wholly unworkable. At a bare minimum, the Indian Commerce Clause and the federal trust obligation require that tribal interests be recognized and respected; an express preemption test fulfills neither requirement.

There is a third textual and historical reason that the Court should not adopt an express preemption rule. The Indian Commerce Clause is one of three Commerce Clauses, granting the federal government broad authority to regulate commerce among the states and with foreign states and Indian

tribes. The interstate and foreign Commerce Clauses both have "dormant" aspects that forbid states from burdening commerce despite the absence of any express congressional prohibition. With regard to state taxes, those that burden interstate commerce are analyzed under a four-part test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which requires a substantial nexus between the state and the item taxed, a fair relationship between the state and the services provided by the state, fair apportionment of the tax, and the absence of discrimination against foreign goods. *Id.* at 279. State taxes that burden international commerce are judged under a rigorous test set forth in *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434 (1979), which includes the four-part *Complete Auto* test, with additional consideration of the risk of multiple taxation and the interest in federal uniformity.

Significantly here, this Court does *not* require an express congressional statement of preemption to invalidate a state tax that burdens interstate or foreign commerce. Indeed, the development of the test for determining when a state tax violates the interstate Commerce Clause is analogous to the Court's movement from the exclusivity of federal regulation to the *Bracker* balancing inquiry. In *Complete Auto*, this Court rejected the longstanding *Spector* rule that a state tax on the "privilege of doing business" is per se unconstitutional when applied to interstate commerce as excessively formalistic and divorced from the true interests served by the interstate Commerce Clause. See 430 U.S. at 278 (citing *Spector Motor Serv.* v. *O'Connor*, 340 U.S. 602 (1951)). But, in doing so, the Court has emphasized that express preemption is not required and that a state's interest in raising revenue must always be balanced against the federal interest in preventing undue burdens and discrimination in interstate commerce:

> it long has been "accepted constitutional doctrine that the commerce clause, *without the aid of Congressional legislation* . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [*Japan Line*, 441 U.S. at 454 (emphasis supplied).]

In the text of the Constitution, the Indian Commerce Clause parallels the interstate and foreign Commerce Clauses in a grammatical sense. This parallel phrasing reveals that the Framers contemplated that the national government would have bilateral relations with the Indian tribes as distinct sovereign entities, just as it would with foreign nations and the several States. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982). There are historic reasons to give the Indian Commerce Clause stronger preclusive effect than the interstate or foreign Commerce Clauses. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause"). But, at the very least, the structure of the Commerce Clause as a whole and the history and purpose of the Indian Commerce Clause militate strongly against Kansas's argument that an express preemption test – which excludes any consideration of the interests of the tribal sovereign – should be adopted in place of a balancing test that respects all relevant sovereigns' interests.

This point – that the individual Commerce Clauses are parallel and that there is no basis in the text or history of the provisions to require express preemption under the Indian Commerce Clause – is not undermined by *Cotton Petroleum Corp.* v. *New Mexico*'s discussion of the differences between the interstate and Indian Commerce Clauses. 490 U.S. 163, 192 (1989). The Court made these observations in explaining that Indian tribes are not states for purposes of determining whether New Mexico's taxation of the mineral production

had to be apportioned in light of the tribal tax. Nothing in that explanation undermines the point that a balancing test is appropriate to determine whether a state tax is invalid under the Commerce Clause generally and the Indian Commerce Clause specifically. Indeed, *Cotton Petroleum* cites and applies the *Bracker* test. See *id.* at 183-86. In Kansas's view, the tribes are no better off than private citizens, protected from state regulation only by express preemption; but, this Court has often made clear that tribes are sovereigns and, for that reason, entitled to have their unique status and interests taken into account where state and tribal interests are both implicated.

At the end of the day, the sole basis Kansas offers for its ahistorical argument that state regulations that infringe Indian sovereignty and burden on-reservation commerce are lawful unless expressly preempted is that interest-balancing is messy. This argument applies to the majority of legal standards because most issues do not lend themselves to inflexible absolutes. Complexity is certainly endemic to cases arising under the interstate and foreign Commerce Clauses. In this area, the Constitution recognizes that the competing interests of sovereigns are at issue; those interests cannot be ignored because the accommodation process is sometimes difficult. (Indeed, it is precisely for this reason that states and tribes often address these potential issues of multiple taxation by negotiated agreement. See Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922 (1999).) The Court's precedents "provide sufficient guidance," *Ramah*, 458 U.S. at 846. Kansas's express-preemption test should be rejected.

2. Kansas's Claim That Its Tax Is Valid Because It Is Formally Imposed On An Off-Reservation Act Is Wrong.

In the alternative, Kansas claims that its fuel tax falls on off-reservation conduct and thus is per se valid, even if it

infringes tribal sovereignty and unduly burdens on-reservation commerce. Preliminarily, as the Tribe's brief shows, Kansas's characterization of its fuel tax as a tax on off-reservation conduct ignores the structure of the statutory scheme at issue: The activity taxed is the use, sale or delivery of motor fuel in Kansas, here the on-reservation sale and delivery of fuel to the Tribe. In any event, as *Amici* show, the State's attempted recharacterization of its tax cannot insulate that tax from a proper Indian Commerce Clause analysis.[2] The issue is not where the tax falls, but whether the tax has a forbidden effect. If a state tax imposed on an off-reservation act significantly burdens on-reservation interests, the balancing inquiry must be conducted.

Like its express preemption test, Kansas's per se legal incidence test reflects the State's indifference to the actual interests at stake here, and its desire to replace an interest-based analysis with a label. The dispositive question here is not the geographic location of the activity taxed, but whether the state tax has an unlawful effect *on tribal sovereignty*. Put differently, it is the location and nature of the *effect*, not the location of the tax, that determines whether that tax may be imposed under the Indian Commerce Clause. To determine whether the tax has an unlawful effect, the interests of all relevant sovereigns must be carefully weighed.

As set forth in Part A, *supra*, the primary purpose and function of the Indian Commerce Clause is *the protection of Indian sovereignty and commerce in Indian country from undue state infringement*. Thus, where, as here, the Court is analyzing whether a state tax on a non-Indian unduly infringes tribal sovereignty and commerce *on the reservation*, the Court is fulfilling the Indian Commerce Clause's core protective purpose. And, the question whether the activity

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[2] Legal incidence is, of course, a question of federal law, as its determination is necessary to protect a federal right. *See Carpenter* v. *Shaw*, 280 U.S. 363, 367-68 (1930).

taxed is on or off the reservation is relevant only insofar as the location exacerbates or ameliorates the burden that the tax imposes on tribal sovereignty on the reservation.

Thus, the question whether a particular tax on a non-Indian has an unlawful effect on the reservation cannot be answered by invocation of a presumption based on the location of the activity taxed. Such a "formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. The Indian Commerce Clause test cannot protect the interests that it is intended to serve if those interests are not even considered. That is why this Court has always conducted a particularized balancing inquiry to determine whether a state tax on non-Indians has an unlawful effect on the reservation, without regard to whether the tax has off-reservation components. See *Bracker*, 448 U.S. at 143-44, 150-51; *Ramah*, 458 U.S. at 843-44 (moving the incidence of a tax upstream or off-reservation to avoid taxing a tribe directly does not save a state tax "whose ultimate burden falls on the tribal organization"); *Milhelm Attea*, 512 U.S. at 73 (applying balancing test to validity of state regulation of off-reservation wholesalers). Cf. *Chickasaw Nation*, 515 U.S. at 459 (where "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax"; the "Indian preemption" test requires the Court to analyze "the balance of federal, state, and tribal interests").

In *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980), this Court invalidated a state gross receipts tax on a non-Indian who did not have a place of business on the reservation, but who sold tractors to tribal Indians on the reservation. The state defended its tax, pointing out that the incidence of the tax fell on the non-Indian whose business was not on the reservation. Rejecting that argument, this Court explained:

> Nor may [the state] distinguish the present case from *Warren Trading Post* [where a state tax on a non-Indian's sales of goods to a tribal Indian was invalidated] by contending that the tax at issue in this case falls upon the [non-Indian] seller of goods and not the [Indian] buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. . . . *[R]egardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission."* [*Id.* at 163 n.3 (citations omitted) (emphasis supplied)].

This Court's concern with state taxation that affects tribal Indians is not merely symbolic – it is substantive. It arises from the Indian Commerce Clause and the historic principles of tribal sovereignty embedded in our constitutional structure, which Kansas embraced when it joined the United States. The Court's jurisprudence is designed to protect those substantive interests, not to enforce a formal rule about the incidence of taxation that would simply facilitate circumvention of the constitutional and historic protections afforded the tribes.

For example, with substantial federal promotion and support, the tribes are now engaged in a multitude of commercial activities from professional services to product development and manufacturing, to natural resource exploitation. See *infra* at 25-26. If states are empowered to capture the full market value generated on Indian reservations simply by shifting the incidence of the tax off the reservation, these important federal and tribal interests will be severely undermined. No bright line test based on the incidence of taxation can fairly accommodate the federal, tribe and state interests that are implicated by state taxation regimes.

It is noteworthy that the Court has rejected analogous requests to adopt formal incidence tests under the parallel provisions of the interstate Commerce Clause. In *Complete Auto*, for example, the Court explained that, in analyzing state

taxes that affect interstate commerce, the Court "has moved toward a standard of permissibility of state taxation *based upon its actual effect rather than its legal terminology*." 430 U.S. at 281 (emphasis supplied). Like the *Bracker* test, *Complete Auto*'s functional analysis "seek[s] to avoid formalism and to rel[y] upon a 'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax.'" *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991) (third alteration in original) (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980)).

It is undisputed that enforcement of the Kansas tax precludes imposition of the tribal tax. And, the statutory pass-through mechanism makes clear that this is *not* a case where a tax on a non-Indian simply increases the non-Indian's costs and has the indirect and speculative effect of making tribal economic activity more expensive or less profitable (*e.g.*, *Thomas*, *Cotton Petroleum*). There is nothing speculative about the burden of Kansas's tax – by statute, it is directly and in its entirety passed through to the Tribe, and imposes an impenetrable barrier to tribal taxation. With this effect, the state tax cannot stand.

3. Kansas's Balancing Derogates The Federal And Tribal Interests At Stake.

Kansas's final argument is that its tax is valid even if the *Bracker* balancing of federal, tribal and state interests is conducted. Kansas's version of this Court's balancing test, however, illustrates what happens when *no* weight is given to the tribal sovereignty interests protected by our constitutional structure and Indian preemption law, and *dispositive* weight is given to the most minimal state interest. The State contends that its interest in collecting $300,000 in fuel tax revenue to fund Kansas roads outweighs the Tribe's sovereign interest in exercising *any* power to tax fuel sold at its on-reservation station as part of its casino complex in order to fund reservation roads, also in Kansas, and recognized by the

federal government as critical to tribal welfare and self-sufficiency. The Tribe is not marketing a tax exemption, assisting tax evaders or engaged in any other illegitimate activity; instead, the Tribe is taxing an on-reservation service to generate revenue to fulfill a governmental function. Moreover, transactions with the Tribe alone among sovereigns are fully taxed. Kansas's version of balancing makes a mockery of tribal sovereignty.

A tribe's "power to tax is an essential attribute of [its] sovereignty because it is a necessary instrument of self-government and territorial management," allowing the tribe "to raise revenues for its essential services." *Jicarilla Apache Tribe*, 455 U.S. at 137. Indeed, a "necessary implication of th[e] broad federal commitment" to tribal self-sufficiency in all its forms is that the tribes have "the power . . . to defray the cost of governmental services by levying taxes." *Mescalero*, 462 U.S. at 335-36. In addition, like any government, a tribe has an important sovereign interest in the construction and maintenance of an infrastructure of roads and bridges on its reservation. Here, under applicable law – and as a result of inadequate federal and state funding for numerous years – the Tribe has assumed financial responsibility "for the majority of the roads and bridges on and near its reservation." Pet. App. 11. The Tribe receives no funding from the State for this purpose. See JA 79. The Tribe's principal economic asset and revenue source is its casino, with associated services such as the tribal gas station. Thus, the Tribe exercised its taxing power to fund its roads programs by imposing a fuel tax on sales at its on-reservation station whose proceeds are used exclusively for this purpose. *Id.* at 48-50 (PBP Code §§ 10-6-1 to -2).

Nothing less than the Tribe's practical ability to exercise one of the most fundamental attributes of sovereignty in order to fulfill a traditional, critical government function is at stake here. Although the State has not passed a law forbidding the Tribe to tax retail sales of motor fuel at its reservation station,

it has constructively done so. "[T]he Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Tribe's] fuel business to virtually zero." Pet App. 12.

If "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status," *Colville*, 447 U.S. at 152, the State cannot impose such a tax. Tribes do not have a theoretical interest in taxing economic activity on the reservation; the tribal interest in taxation (like that of the United States and the states) is a practical interest in the ability to raise essential funds for public purposes, here the building and maintenance of roads. Where state regulation constructively eliminates a tribe's ability to exercise its sovereign power, the tribal interest in precluding such regulation should be dispositive. Tribal sovereignty would be "hollow," indeed, if "[t]he Tribe could thus exercise its authority over the reservation only at the sufferance of the State." *Mescalero*, 462 U.S. at 338.[3]

Moreover, under the circumstances, the Tribe bears the full economic burden of the Kansas motor fuel tax. Although the Court will not strike down a tax on a non-Indian simply because the tribe bears the economic burden of the tax, that fact is important in assessing the relative importance of the Indian interest. Compare *Bracker*, 448 U.S. at 151-52; *Ramah*, 458 U.S. at 844 n.8 (finding "it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company") with *Cotton Petroleum*,

[3] *Compare Cotton Petroleum*, 490 U.S. at 185 (permitting state severance tax on non-Indian's leased oil and gas production where the state tax imposed "'no economic burden . . . on the tribe'" because "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development") (alteration omitted).

490 U.S. at 185 ("'no economic burden [fell] on the tribe by virtue of the state taxes'") (alteration omitted). And, it is particularly important where, as here, the fact and extent of the economic harm to the Tribe is *certain*; the tax is passed on to the Tribe in its entirety.[4]

In addition, this is not a case like *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976), or *Colville*, 447 U.S. at 155, where the tribes had no legitimate interest in exercising their sovereign power to assist state tax evaders or in marketing an exemption from state tax law, respectively. Here, the Tribe "sells fuel at fair market prices," JA 133-134, 40, 86, 69-70; and "'"the value marketed" by [the Tribe's] Station results from the business generated by the casino and from employees of the casino and [Tribal] government and residents.'" Pet. App. 3. A tribe has a substantial, legitimate interest in an on-reservation market when it generates sales that "would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the [product]," *even "if credit [for the tribal tax] were given."* *Colville*, 447 U.S. at 158 (emphasis supplied).

In fact, a tribe's interest in raising revenue is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes." *Colville*, 447 U.S. at 156-57; *Milhelm Attea*, 512 U.S. at 73 (same). See also *Cabazon Band*, 480 U.S. at 219. As noted above, with strong federal backing and pursuant to federal statutes and

[4] The Court has upheld state property taxes on railroad rights-of-way and non-Indian livestock grazed on reservation lands. *See Maricopa & Phoenix R.R.* v. *Territory of Ariz.*, 156 U.S. 347 (1895); *Wagoner* v. *Evans*, 170 U.S. 588 (1898); *Thomas* v. *Gay*, 169 U.S. 264 (1898). In these cases, the only Indian interest asserted was the Indians' potential ability to obtain marginally more money from the rights-of-way or leases if the taxes were preempted – interests the Court considered too remote and speculative to invalidate state regulation. *See Thomas*, 169 U.S. at 273-74.

regulatory programs,[5] Indian tribes today are engaged in a broad array of economic activities on reservations, including commercial exploitation of natural resources, basic manufacturing, professional services, product development and cultural and entertainment activities. See, *e.g.*, *Cabazon Band of Mission Indians* v. *Wilson*, 37 F.3d 430 (9th Cir. 1994) (tribal investment in off-track wagering facility); *Hoopa Valley Tribe* v. *Nevins*, 881 F.2d 657 (9th Cir. 1989) (tribal investment in timber operation). A state tax *that entirely precludes tribal taxation* by capturing all tax revenues available on such activities and products – as the Kansas tax does – both infringes tribal sovereignty and undermines the federal interest in promoting tribal enterprises that generate economic value on reservations.

The substantial infringement of tribal sovereignty worked by the Kansas tax alone should result in its invalidation. It does not stand alone, however. The Tribe's brief fully details Congress's comprehensive scheme regulating the funding, construction and maintenance of roads on reservations – a scheme responsive to the dismal and dangerous condition of reservation roads and the urgent need for improvement of this vital infrastructure to further the paramount federal goals of tribal sovereignty and economic self-sufficiency. *Amici* endorse and adopt the Tribe's delineation of the substantial federal interests obstructed by Kansas's tax. Specifically, federal laws governing the Indian Reservation Road ("IRR") system recognize the tribes' interest qua sovereigns in road

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[5] Congress has routinely acknowledged and sought generally to encourage tribal sovereignty and economic self-sufficiency. That purpose and policy is embodied in federal statutes such as the Indian Reorganization Act, 25 U.S.C. §§ 461-479, the Indian Self-Determination and Education Act, 25 U.S.C. § 450f *et seq.*, and IGRA. *See also*, *e.g.*, *Cabazon Band*, 480 U.S. at 216 ("[t]he inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development").

planning, regulation, and construction, and identify a "[t]ribal fuel tax" as a vital source of funds for IRR projects. 25 C.F.R. § 170.932(d). See 23 U.S.C. § 135(d)(2), (e)(2)(C), (f)(1)(B)(iii) (mandating state consultation with the tribes on roads issues related to Indian country). Viewed through the proper lens, the Kansas tax obstructs full implementation of the specific federal purposes of improving tribal roads and supporting tribal efforts to act as responsible sovereigns and to raise revenue to do so. Where, as here, a state tax precludes tribal taxation of an on-reservation activity, it undermines these important federal interests.

State interests such as those at stake here are not "sufficient to justify the assertion of State authority." *Mescalero*, 462 U.S. at 334. Like tribes, states always have a significant sovereign interest in enforcing a tax to obtain funds for roads and other government projects, but the state tax here effectively eliminates any tribal taxing power and thus significantly impinges on the Tribe's on-reservation sovereignty, while the loss of the tax revenues from transactions with the Tribe has a very small impact on the State's fuel tax revenues. Of the roughly $429 million Kansas annually collects from its motor fuel tax, approximately $300,000 would be laid upon fuel distributed to the Tribe. See *id.* at 343 (limiting state interest in tax because "[t]he loss of revenue to the State is likely to be insubstantial"). However substantial state interests in their taxing authority are, tribes have an analogous interest. Thus where, as here, the tribal power to tax is obliterated by a state tax, the tribe's interest necessarily outweighs the state interest.

In addition, the State's interest in revenues related to a particular transaction should be reduced when the tribal tax produces revenues devoted to a legitimate governmental purpose. For example, like all Kansas citizens, tribal members benefit from Kansas's network of roads; but tribal members and non-members also benefit from reservation

roads. Kansas law requires the State to remit a significant percentage of its fuel tax funds to cities and counties, *but not to Indian tribes*, for road projects. Kan. Stat. Ann. § 79-34, 142. And, the Tribe is using its fuel tax proceeds exclusively for roads projects within the reservation. Put differently, the Tribe's tax does not deprive the State road system of revenue; it simply results in the use of less than one-tenth of one percent of the motor fuel tax proceeds for on-reservation road projects in the State. Cf. *Ramah*, 458 U.S. at 844 n.9 ("the state tax revenues derived from [the non-Indian contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides to [that contractor]"). Kansas fails to recognize either its omission or the Tribe's beneficial use of the funds in its "balancing" of the relevant interests.

In this connection, it is difficult to discern the legitimacy in Kansas's determination that it may nullify the Tribe's taxing authority by collecting all motor fuel tax revenues resulting in the Tribe's inability to collect any. A state is not required strictly to adhere to proportional taxation when its taxes overlap with those of a tribe with concurrent jurisdiction. But a state should not be permitted to act in complete derogation of the tribes' sovereign taxing power and responsibilities, and this is precisely what Kansas's version of balancing would allow. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. at 114, 124-25 (1993).

Finally, a state's interest in enforcing a tax must be diminished if its tax scheme is discriminatory. Kansas does not tax distributors' transactions with the United States or its contractors. When the State taxes distributors' transactions with Kansas, it simply moves the money from one "pocket" to another. Even local governments receive a mandated rebate of almost half of *all* fuel taxes for their roads projects, counterbalancing any taxes they pay on distributors' transactions with them. See Kan. Stat. Ann. §§ 79-3402,

-34,142 (formula). The Tribe is the only sovereign neither exempted from the tax nor entitled to share in its revenues.

Kansas cannot see any derogation of the Tribe's interest here because it does not view the Tribe as retaining inherent sovereign powers or responsibilities on the reservation. And, indeed, Indian tribes have not generally prospered under the balancing test of *Bracker* and its progeny. In its application, federal courts have tended to favor familiar state interests over tribal interests which are less well known. As a result, state taxation often drains reservation economies, while states make little or no contribution to reservation infrastructure.

Kansas's application of *Bracker* balancing, however, would go even further in this direction, placing a thumb permanently on the states' side of the scale in the balancing process. This is a case where any reasonable analysis demonstrates that the tax substantially infringes federally-protected interests and the Tribe's right to self-government, nullifying any tribal ability to levy a fuel tax and fulfill its sovereign responsibilities vis-à-vis reservation roads, and the State interest is transferring $300,000 in fuel tax revenues from one set of Kansas roads to reservation roads also in Kansas. Yet Kansas urges the Court to scrap any balancing or infringement test, or to apply a balancing test in ways entirely divorced from its constitutional origins. The Tribe is a responsible government that is not marketing a tax exemption but instead exercising its taxing authority to build reservation roads and fulfill important governmental functions. Its authority should be upheld. Kansas's fuel tax is unconstitutional.

CONCLUSION

The decision of the Tenth Circuit should be affirmed.

Respectfully submitted,

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13

No. 04-631

AUG 1 5 2005

In The
Supreme Court of the United States

JOAN WAGNON, in her official capacity
as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
ARGUMENT	2
I. Because The Legal Incidence Of The Kansas Fuel Tax Is Imposed Off-Reservation, *White Mountain Apache* Balancing Does Not Apply	2
II. Respondent's Defense Of The *White Mountain Apache* Balance-Of-Interests Test Is Unpersuasive	9
III. The Court Of Appeals' Erred In Its Application Of The Balancing Test	12
IV. The Kansas Fuel Tax Not Otherwise Preempted By Federal Law	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) 16

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 8

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 6, 16, 17

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 8

Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 515 U.S. 450 (1995) .....*passim*

Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) .....*passim*

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 16, 17, 18

Heller v. Doe, 509 U.S. 312 (1993) 7

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 20

Jicarilla Apache Tribe v. U.S. 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979) 16

Kaul v. State Dept. of Revenue, 266 Kan. 464 (Kan. 1998), *cert. denied*, 528 U.S. 812 (1999) 8, 9

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 19

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 7, 8, 17

TABLE OF AUTHORITIES – Continued

Page

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 5, 16, 18

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 4

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 16

Prairie Band Potawatomi Nation v. Richards, 241 F. Supp.2d 1295 (D. Kan. 2003) 5

Prairie Band Potawatomi v. Richards, 379 F.3d 979 (10th Cir. 2004) 2

Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 6

Sac and Fox Nation of Missouri v. Lafaver, 31 F. Supp.2d 1298 (D. Kan. 1998) 5, 19

Sac and Fox v. Pierce, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) 1, 5, 7, 9, 15

State ex rel. Stephan v. Finney, 251 Kan. 559 (1992) 19

United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) 6

United States v. California State Bd. of Equalization, 650 F.3d 1127 (9th Cir. 1981), *aff'd mem.*, 456 U.S. 901 (1982) 5

U.S. v. Ward, 1 Woolw. 17, 1 Kan. Dass. Ed. 601 C.C.D. Kan. (1863) 16

Warren Trading Post v. Tax Comm'n, 380 U.S. 685 (1965) 16, 17

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

Winnebago Tribe of Nebraska v. Kline, 297 F. Supp.2d 1291 (D. Kan. 2004) 5

Winnebago Tribe of Nebraska v. Stovall, 216 F. Supp.2d 1226 (D. Kan. 2002) 5

Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) 1

STATUTES

Act for Admission of Kansas Into the Union Ch. XX, § 1, 12 Stat. 126 (1861) 15

25 U.S.C. §§ 261-264 16

Kan. Stat. Ann. § 79-3401 (Supp. 2003) 4

Kan. Stat. Ann. § 79-3401(p) (Supp. 2003) 3

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) ..... *passim*

Kan. Stat. Ann. § 79-3408(d)(1) 8

Kan. Stat. Ann. § 79-3408(d)(2) 7

Kan. Stat. Ann. § 79-3408(d)(3) 7

Kan. Stat. Ann. § 79-3409 (Supp. 2003) 3, 4, 5

Kan. Stat. Ann. § 79-3410(a) (Supp. 2003) 3, 5

Okla. Stat., Tit. 68, § 505C 4

Okla. Stat., Tit. 68, § 506a 4

TABLE OF AUTHORITIES – Continued

Page

OTHER

Pub. L. No. 105-178, 112 Stat. 107 (1998) 14

25 C.F.R. § 170 14

25 C.F.R. § 170.101 15

REPLY BRIEF FOR PETITIONER

Respondent advances three propositions in support of the court of appeals' decision: (1) the balance-of-interests standard in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) applies because the "taxable event" is not the distributor's first receipt of fuel, but rather the subsequent delivery to Respondent's reservation (Respondent's Br. 11, 15) and that, in any event, the Kansas tax is "discriminatory" (Respondent's Br. 17); (2) no need exists to reconsider *White Mountain Apache* because courts – including this Court – have refined the analytical framework and applied it to specific factual situations without a problem (*Id.* 48-49); and, (3) in applying the balancing test, the court of appeals was correct in finding the balance in favor of Respondent because Respondent is not marketing a tax exemption (*Id.* 31) and the State provides no services on tribally owned roads (*Id.* 13). For the following reasons, these arguments are unpersuasive.

First, Respondent asks this Court to ignore the express language in Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) specifying the *first receipt* of motor fuel by the distributor as the moment at which the fuel tax attaches. The limited exceptions to the tax liability – *e.g.*, motor fuel sold to the United States or its contractors, or motor fuel exported to other states – have no application here, and do not alter the point at which the distributor, manufacturer or importer incurs tax liability. Virtually every argument asserted by Respondent requires this Court to ignore the express language of the Kansas Motor Fuel Tax Act. *Second*, the suggestion that the *White Mountain Apache* balancing test has proved unproblematic in a taxation context cannot be squared either with the two Tenth Circuit decisions addressing fuel taxes (the opinion below and *Sac and Fox v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001)), or with the most recent Ninth Circuit decision concerning state authority to tax non-tribal entities doing business with tribes on reservation, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1996). *White Mountain Apache* balancing simply

invites continued, highly amorphous litigation in an area that demands certainty. This case highlights the need for the Court to abandon balancing and instead adopt pre-emption based on congressional intent.

Last, Respondent's pretense that the State provides no services is plainly wrong. The record shows that the State provides substantial services on and off Respondent's reservation that benefit Respondent directly, and that are directly related to the taxes at issue here. (J. A. 79, 115, 118). Further, Respondent's claim that a state tax is permissible only when a tribal retailer "markets" an exemption from a state tax, and that invalidation of an off-reservation state tax is proper merely because customers are drawn to the station by Respondent's casino, ignores *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

ARGUMENT

I. Because The Legal Incidence Of The Kansas Fuel Tax Is Imposed Off-Reservation, *White Mountain Apache* Balancing Does Not Apply

Respondent does not dispute Kansas' position that balancing under *White Mountain Apache* has no application when a State taxes or regulates off-reservation transactions or activity. Instead, Respondent simply denies that the tax here accrues off-reservation. There is no basis for such an assertion. The court below specifically held that the legal incidence of the tax at issue here is imposed on the distributor, a determination that comports with the text of the statutes. Further, the court below did *not* find that the taxable event is on the distributor's delivery of fuel to Respondent. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982 (10th Cir. 2004).

A. The plain language of the Kansas statutes impose the tax's legal incidence on the distributor's *first receipt* of fuel (here, off-reservation). Kan. Stat. Ann. § 79-3408(c) thus provides unequivocally that, "the incidence of this tax is imposed on the *distributor* of the first *receipt* of the motor

fuel." That such fuel may subsequently be marketed on or off-reservation is immaterial, since the legal obligation to pay the tax accrues upon receipt up stream and off-reservation. Respondent's re-characterization of the state tax as directed at on-reservation activity is palpably inaccurate. The Kansas statutes expressly identify who bears the fuel tax's legal incidence, and when that liability attaches.

Kan. Stat. Ann. § 79-3410(a) imposes the *payment* of tax liability upon the distributor:

> Every distributor, manufacturer or importer within the time herein fixed for the rendering of such reports, shall compute and shall pay to the director at the director's office the amount of taxes due to the state on all motor-vehicle fuels or special fuels *received* by such distributor, manufacturer or importer during the preceding calendar month. (Emphasis added.)

The term "retailer" is tellingly absent from § 79-3410(a). By leaving the retailer out of the payment provision, the legislature not only manifested its intent that the legal incidence of the fuel tax is on the distributor, importer or manufacturer but also that the attendant tax obligation accrues upon *receipt*. The term "received" admits of no construction that would allow a subsequent "event," such as delivery, to trigger the tax.[1]

Indeed, any other conclusion would run headlong into Kan. Stat. Ann. § 79-3409 which permits, but does not require, the distributor to "charge and collect an amount, including the cost of doing business that could include such tax on motor-vehicle fuels or special fuels sold or delivered by such distributor, as a part of the selling price." Respondent

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[1] Consequently, for immediate purposes, "first receipt" occurs when the involved distributor deposited fuel into "tank cars, tank trunks or other container" or into "any tank from which withdrawals are made direct into tank cars, tank trunks or other types of transportation equipment, containers or facilities." Kan. Stat. Ann. § 79-3401(p). That receipt necessarily takes place outside Respondent's reservation since the fuel must later be transported to the tribal retail outlet.

imputes to the Kansas legislature an intent to bestow upon distributors the discretion to determine when and where the "taxable event" occurs. Obviously enough, however, that event occurs when the distributor becomes liable for the tax and is not subject to modification by a subsequent decision to pass, or not pass, the tax through to the retailer as part of "the cost of *doing business*." (Emphasis added.) The distributor, in other words, acts as an entrepreneur, not as an involuntary state agent, in determining whether to transfer all or some of the economic burden of the tax down the distribution chain, and it therefore makes no sense to suggest that the legislature attached "taxable event"-shifting authority to an entirely private market-based choice.

The Kansas Motor Fuel Tax Act, Kan. Stat. Ann. § 79-3401, *et seq.*, is distinctly different from the Oklahoma act addressed in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). The Oklahoma statutes did not expressly identify who bears the tax's legal incidence. Here, Kansas statutes plainly identify who bears the legal incidence, and when the tax accrues. Nowhere do the Kansas statutes identify the remittance by distributors, manufacturers or importers as being *on behalf of a licensed retailer*, a feature of Oklahoma statute that the *Chickasaw Nation* Court deemed to be *crucial*. *See,* Okla. Stat., Tit. 68, § 505C. Nowhere do the Kansas statutes authorize a distributor, importer or manufacturer to deduct uncollected fuel taxes from future payments to Kansas. *Compare,* Okla. Stat., Tit. 68, § 505C. Nowhere do the Kansas statutes authorize distributors, importers or manufacturers to keep a portion of the fuel tax as a collection fee as Kansas' "agent." *Compare,* Okla. Stat., Tit. 68, § 506a. Finally, the Kansas "pass through" provision is discretionary, not mandatory. Kan. Stat. Ann. § 79-3409.

In addition to the court below, other lower federal courts in the Tenth Circuit have had no difficulty recognizing the

Kansas Legislature's determination that the incidence of the tax here is on a distributor's first receipt of fuel.[2]

"[T]he legal incidence of a tax falls on the party who the *legislature* intends will pay the tax." *United States v. California State Bd. of Equalization*, 650 F.3d 1127, 1130-31 (1981), *aff'd mem.*, 456 U.S. 901 (1982) (emphasis supplied). Consonant with this principle, an explicit legislative allocation of tax incidence to a particular economic entity, *e.g.*, the distributor, importer or manufacturer, is controlling. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482 (1976). It is only "[i]n the absence of such dispositive language" that a court is required to engage in statutory exegesis. *Chickasaw Nation*, 515 U.S. at 461. There is no need for the Court to doubt the Kansas Legislature's intent; it clearly placed the legal incidence of the Kansas tax on importers, distributors and manufacturers, when they receive the fuel. In this case, that receipt occurred off-reservation.

Having wrongly argued that the state tax statutes impose tax liability on reservation delivery (thus creating the fiction that the state is taxing on-reservation activity)

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[2] "Under the Kansas statutory scheme, the legal incidence of the state's fuel tax falls on the 'distributor of first *receipt*' of such fuel. Kan. Stat. Ann. § 79-3408(c). The distributor must compute and remit the tax each month for the fuel *received* by the distributor in the State of Kansas. KSA § 79-3410." *Winnebago Tribe of Nebraska v. Kline*, 297 F. Supp.2d 1291, 1294 (D. Kan. 2004). (Emphasis added.) "The structure of the fuel tax statute (Kan. Stat. Ann. § 79-3409) places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers." *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp.2d 1295, 1298, 1307-08 (D. Kan. 2003). "The legal incidence of the fuel tax falls on the 'distributor of first *receipt*' of such fuel." *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp.2d 1226, 1228 (D. Kan. 2002). (Emphasis added.) "The court has found nothing in the Kansas tax laws, either prior to or after the 1998 amendments, which places the legal incidence of this tax on the retailer. Rather, the statutes are extremely clear in providing that the tax in question is imposed upon the distributor." *Sac and Fox Nation of Missouri v. Lafaver*, 31 F. Supp.2d 1298, 1304, 1307 (D. Kan. 1998). "We agree with the district court that the legal incidence of the tax law as presently written falls on the fuel distributors rather than on the Tribes." *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 578 (10th Cir. 2000).

(Respondent's Br. 24 n.6), Respondent's reliance on *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), misses the mark widely.

These two cases considered the validity of a State's taxing amounts received from a tribe for, in *Central Machinery*, the sale of tractors pursuant to an agreement executed *on* reservation (448 U.S. at 161 n.1) and, in *Ramah Navajo*, a contract for the construction of an *on*-reservation tribal school (458 U.S. at 836). Respondent appears to argue that each of these cases had some off-reservation aspects. However, it is clear that the transactions the States in these respective cases sought to tax or regulate occurred *on* reservation. The situation here differs dramatically because the State tax is imposed and becomes due and owing off-reservation prior to actual delivery to the Respondent's station.

Finally, *amicus curiae* United States' claims that retailers bear the tax's legal incidence. (*Amicus Curiae* U.S. Br. 9-19). This issue was not raised below and has not been presented in Respondent's briefing. It therefore should not be considered. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Nevertheless, even if entertained, the United States' proposed construction cannot be reconciled with the statute's language or lower court authority.

The Court should reject Respondent's contention that the legal incidence of the Kansas fuel tax is not on the first receipt of the fuel by the distributor, manufacturer or importer, and conclude that there is no authority supporting the application of *White Mountain Apache* balancing to strike off-reservation state taxation. Once this conclusion is reached, Respondent's remaining arguments crumble.

B. Respondent argues that the Kansas tax is discriminatory. (Respondent's Br. 17). This argument is based on Kansas providing an exemption for fuel delivered to points outside of Kansas. It is clear, however, that the export exemption is for fuel delivered outside of Kansas, and the court of appeals has determined that Indian reservations are in Kansas, not outside. "The Kansas

motor fuel tax law imposes a *non-discriminatory* tax on all wholesale fuel distributors for fuel distributions to retailers within the State of Kansas – Indian or otherwise." *Sac & Fox*, 213 F.3d at 582. (Emphasis added.)

A nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity. *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 970 (10th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 515 U.S. 450 (1995).

Respondent's additional contention that the Kansas fuel tax is "discriminatory" and accordingly outside the scope of *Mescalero Apache* is flawed for two fundamental reasons. The first is quite straightforward and wholly ignored by Respondent. Because the non-tribal distributor, not Respondent, is the entity regulated off-reservation, this Court need not even consider precisely what special "discrimination" standards, if any, apply under *Mescalero Apache*. Ordinary, Fourteenth Amendment-based equal protection principles govern and, given the absence of any basis for strict scrutiny, require only a rational-basis for not granting an exemption from the state tax for fuel delivered to tribal retailers such as that extended under § 79-3408(d)(2) and (3) to the United States or to its contractors with cost-plus-a-fixed-fee contracts. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 325-26 (1993).

Even if *Mescalero Apache* applied directly, neither the analysis nor the result would differ. This Court held there that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. On its face, such a standard merely sets forth the requirement otherwise implicit in the Equal Protection Clause that tribal members be accorded the same rights and privileges as other "citizens" – i.e., that they not be discriminated against because of their tribal status. The Kansas fuel statute embodies no such discrimination against tribal members or tribes themselves.

For example, there is no exemption from distributor tax liability granted to governmental sovereigns of any kind, and the suggestion that Respondent is treated differently from other sovereigns, except the United States, with respect to intrastate "sales or deliveries." (Respondent's Br. 18) misreads Kan. Stat. Ann. § 79-3408(d)(1) which exempts only sales or deliveries for export *out of state*. Whatever else might be said about Respondent's reservation, it lies within Kansas (*Cotton Petroleum*, 490 U.S. at 188), and Indian reservations are admittedly quite distinct from States and foreign countries under the federal constitution. *E.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831). There is no basis in this Court's jurisprudence for the notion that Kansas may not distinguish between tribes with reservations located in-state and other sovereigns for multiple purposes, including taxation, without running afoul of the "discrimination" prohibition in *Mescalero Apache*.

C. Respondent's and *Amicus* United States' reliance on *Kaul v. State Dept. of Revenue*, 266 Kan. 464, 970 P.2d 60 (Kan.1998), *cert. denied*, 528 U.S. 812 (1999), for the proposition that the legal incidence of the Kansas fuel tax is predicated on events that transpire subsequent to the receipt of fuel by the distributor, importer or manufacturer is also incorrect.

Kaul only addressed the narrow question of whether the plaintiff in that case (an Indian on Respondent's reservation selling gasoline at retail) had standing. The court acknowledged that the distributor is liable for the payment of the fuel tax, but that the distributor may collect the tax from the retailer as part of the selling price (merely representing a cost of doing business). *Kaul* 266 Kan. at 474. Since the distributor in *Kaul* itemized the cost of the tax on its billing, the plaintiffs were held to have standing because they felt the economic pinch of the cost of the tax. *Id*. However, standing and legal incidence

are two discrete concepts. Standing, when grounded in economic burden, gets you in the courtroom doors (which is all that *Kaul* addressed), but, once inside, the question remains as to where the legal incidence of the tax rests. The *Kaul* Court never addressed the question of "legal incidence" in the context of whether a state tax is pre-empted for federal Indian law purposes. Clearly, Respondent is mixing economic burden for standing purposes with legal incidence for preemption purposes. The two are different, and *Kaul* is simply in apposite.

II. Respondent's Defense Of The *White Mountain Apache* Balance-Of-Interests Test Is Unpersuasive

Respondent offers little justification for maintaining the *White Mountain Apache* balance-of-interests test in an area in which this Court has recognized a need for legal certainty. *Chickasaw Nation*, 515 U.S. at 460. The proffered justification – that the current balancing test has been applied without a problem (Respondent's Br. 48) – is simply not credible. Moreover, Respondent's reiteration of the myriad "unique" and "narrow" facts, and the laundry list of its economic circumstances simply beg the question as to whether balancing is viable.[3]

The difficulty in applying *White Mountain Apache* where state taxes are challenged, and the attendant lack of predictability, cannot be fairly denied given the conflict between the decision below and *Sac and Fox*, the case that

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[3] One simple example from the court of appeals decision points to the inherent flaw of balancing. The court of appeals found that Respondent's fuel price is within two cents of market. J. A. 134. But what if it was four cents, six cents, eight cents, a dime below market? Now does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? What about other tribal businesses? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

Respondent relies upon for its perverse claim that, except in "unique" circumstances, "the Tenth Circuit has *preserved* the Kansas fuel tax, even as applied to fuel distributed to tribal retailers." (Opp'n 27). Below, the court of appeals relied upon the concept of "reservation value added" to invalidate the Kansas tax – a concept aimed at capturing the notion that most fuel purchasers at the tribal station were drawn to the reservation by the casino. The elastic nature of that notion hardly needs detailed elaboration.

Under the court of appeals' approach, states likely will be required either to adduce or rebut evidence related to, among other things, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each are, literally, endless and unknowable for viable predictability of tax administration. Respondent is tellingly silent as to the necessary implications of the interest balancing they portray as predictable. All Respondent says is, in effect, "There is no need to abandon balancing."

Respondent also argues that *White Mountain Apache* balancing is a "synthesis of 200 years of Indian Law." (Respondent's Br. 47). That is plainly wrong. In fact, as properly noted by Justice (now Chief Justice) Rehnquist in *Colville*, the introduction of balancing was the anomaly.

> I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of

> taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interest is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.

Colville at 176-77. As Chief Justice Rehnquist noted in *Colville*, balancing lends itself to protracted litigation as parties disagree over facts, which facts are to be balanced, how they are to be balanced, which facts are to be accorded weight, how much weight they are to be accorded, and so on. Thus, while balancing was thought to provide clear guidance and lines of demarcation, just the opposite has proven true. This case demonstrates why balancing needs to be replaced with preemption based on congressional intent.

To support adherence to balancing, Respondent contends that the State and local governments provide no services on tribally owned roads. (Respondent's Br. 13). Of course, Respondent does admit that Petitioner provides services on its reservation (*Id.* 19), but then asserts, albeit obliquely, that those services do not count because Petitioner, "already collects fuel taxes from the other two non-tribal stations." (*Id.* 19-20).

In fact, the State and local governments provide services (including significant fuel tax revenues) to about 45% of all roads on the reservation. (J. A. 79). Moreover, the district court below determined that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation, and the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway runs through the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation. (J. A. 115, 118).

Balancing, which was once a shield for tribes, has now been forged into a sword to hack away at off-reservation state authority. The *White Mountain Apache* balancing test, as applied by the court below, has now been extended

far beyond its originally intended purpose. This case illustrates the point that the balancing test has fostered a process of picking and choosing facts and creating novel theories and then altering them along the way that makes *ipse dixit* rationale possible. This case is emblematic of the need for this Court to abandon the balancing test, and instead adopt preemption based on congressional intent.

III. The Court Of Appeals' Erred In Its Application Of The Balancing Test

Respondent defends the court of appeals' application of the *White Mountain Apache* interest-balancing standards on several grounds that "the Nation Station's customers are generated by the casino and other on-reservation values" (Respondent's Br. 32), the tribe is not marketing an exemption (*Id.* 31) and that the State "provides no services at all on tribally owned reservation roads." (*Id.* 13, 44)

While Respondent's brief leaves the false impression that the State does nothing for roads and bridges on the reservation, the uncontroverted facts show precisely the opposite. State and local state governments have responsibility for nearly 100 miles of reservation roads. (J. A. 79) The 45% of reservation roads maintained by the State and local governments is in addition to the state built and maintained U.S. State Highway 75 running through Respondent's reservation. Funding for these state road services comes from the state fuel taxes at issue here. The absence of this integrated road system infrastructure provided by the State would make the existence of Respondent's casino and fuel station a practical impossibility.

There can be no legitimate dispute that Kansas provides substantial services which provides access to Respondent's casino and gas station. This is not, in other words, "a case in which the State has nothing to do with the [alleged] on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186.[4]

[4] Petitioner has identified substantial services and regulatory functions directly related to its exercise of off-reservation fuel taxation. This is in stark contrast to a state tax being preempted when a state

(Continued on following page)

Respondent also argues that the taxes at issue are not proportional to services provided by the State. (Respondent's Br. 42). However, proportionality has never been a sufficient basis for striking a state tax. "Neither *Bracker*, nor *Ramah Navajo School Bd.*, however, imposes such a proportionality requirement on the States." *Cotton Petroleum*, 490 U.S. at 185. "Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector." *Id.* n.15.

Respondent also believes that the balance-of-interests favors the State only when a tribe is marketing an exemption. There is no support for this proposition. The fact that a tribe attempts to attract customers to its reservation through a tax differential constitutes only one factor that bears upon the preemption challenge's outcome. *See Colville*, 447 U.S. at 155. Moreover, by selling its fuel at market prices, Respondent is making both a profit and collecting a tax. While the state tax here might burden Respondent's profits, it can claim no right to unlimited sales volume or profit. *Id.* 151 n.27. A tax on non-Indians may be valid even if it seriously disadvantages or *eliminates* the Indian retailer's business with non-Indians. *Id.* (Emphasis added.) Accordingly, the court of appeals' preemption determination is reduced to the conclusion that Respondent provides added reservation value because the gas station sits next to Respondent's casino.

This Court in *Cotton Petroleum* has removed any doubt that the mere presence of "reservation value added" is insufficient to preempt a state tax whose legal incidence

was "unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation," *White Mountain Apache*, 448 U.S. 148-49. See also *id.*, at 174 (Powell, J., concurring) ("The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control").

is borne by a nonmember. The presence of such value in *Cotton Petroleum* was undisputed since the state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What was equally dispositive was the fact that the State provided "'substantial services'" to the tribe and the mineral lessee (*id.* at 185).

Finally, Respondent, for the first time in this case, adds to the mix the Indian Reservation Roads Program (IRRP) 25 C.F.R. § 170 (which it claims demonstrates a comprehensive federal regulatory scheme sufficient to oust off-reservation state jurisdiction) together with IGRA, Presidential Proclamations, and the other generalized federal enactments cited by the court of appeals as demonstrative of federal interests against the Kansas tax. (Respondent's Br. 35-40).

The IRRP and related Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) do not constitute a comprehensive federal regulatory scheme akin to that at issue in *White Mountain Apache*. *See* 448 U.S. at 149. Here, there has been no showing that the Federal Government has undertaken to regulate the most minute details of motor fuel distribution, and nothing in the IRRP or TEA-21 suggests otherwise. Rather, these acts and regulations merely provide a source of funding for reservation roads, and make generalized statements about providing guidance, providing funding distribution methodology, encouraging cooperation between state highway agencies, federal agencies and tribes.

Nor is there is anything within the Act that creates and establishes a comprehensive federal regulatory scheme sufficient to oust off-reservation state taxation. Its scope is limited to on-reservation activity, and does not address off-reservation state authority. In fact the IRRP makes clear that it does not have significant federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of States. *See* § 170.101.

IV. The Kansas Fuel Tax Not Otherwise Preempted By Federal Law

Respondent raises several additional matters. While raised below, none were the basis for the court of appeals' decision.

1) Respondent posits that the Act for Admission of Kansas Into the Union prohibits the tax at issue in this case.[6] As the Tenth Circuit stated in *Sac and Fox*, "the Act for the Admission of Kansas into the Union . . . [does not] lend[] any support to the Tribes' challenge to the Kansas motor fuel tax law." 213 F.3d at 577.

Further, the meaning of this section of the Act is that establishing the metes and bounds of Kansas did not lessen the geographic dimensions of Indian reservations then

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[6] The operative language pointed to by Respondent is:

> That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the following boundaries . . . Provided, That nothing contained in the said constitution *respecting the boundary* of said state shall be construed to impair the rights of person or property *now pertaining* to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians. . . ." (Emphasis supplied.)

Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

existing. In other words, the *dimensions* of the State set forth in the Act would not be construed to permit a "land grab" and wrest reservation land from the Indians as set forth in the then existing treaties. *See U.S. v. Ward*, 1 Woolw. 17, 1 Kan. Dass. Ed. 601, 604-05 C.C.D. Kan. (1863).

Enabling Acts themselves require states to disclaim only their proprietary interest in Indian land, not their governmental or regulatory authority over that land. *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-69 (1962); *Jicarilla Apache Tribe v. U.S.* 601 F.2d 1116, 1135 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561-63 (1983).

2) Respondent, and in particular *Amicus* United States, argue that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, prohibit application of the state tax at issue here. The Indian Trader Statutes, however, are of no assistance to Respondent.

Respondent relies heavily upon *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965), and *Central Machinery*. Both cases, however, not only are distinguishable factually but also have been limited by this Court explicitly in *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71, 75 (1994), and implicitly in *Chickasaw Nation*.

First, both *Warren* and *Central Machinery* involved traders selling, in one instance, goods and, in the second, tractors to tribal members and a tribe for *their* consumption or use. Here, the vast majority of fuel sold to Respondent is being *re-sold* to consumers, virtually all of whom are non-tribal members, and most of such fuel is consumed off reservation. This controversy accordingly does not present an instance where the "assessment and collection of th[e] tax 'would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations'" since the fuel tax, to the extent passed on by the distributor to the tribal retailer, will be passed through to the ultimate consumer. *Moe*, 425 U.S. at 482 (quoting *Warren*, 380 U.S. at 691). The underlying

rationale for the Indian Traders Statutes – protecting tribes from commercial overreaching – has no relevance under these circumstances. *See Central Machinery*, 448 U.S. at 163. The tax further differs from the exactions struck down in *Warren* and *Central Machinery* because it is not triggered by fuel sales to Respondent; rather, the distributor's tax obligation arises, as discussed in Part I.A, upon its receipt of fuel.

Second, reliance on the Indian Trader Statutes cannot be squared with *Milhelm Attea* and *Chickasaw Nation*. This Court clarified in the first of those decisions that, notwithstanding "broad language" in *Warren*, "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment and collection of lawful state taxes." *Milhelm Attea*, 512 U.S. at 75. Although *Milhelm Attea* did not address directly the question of imposing a tax on an Indian trader with respect to an on-reservation transaction, its reference to "lawful taxes" presumably referenced this Court's more general Indian-law taxation jurisprudence, including that in *White Mountain Apache* and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The import of *Milhelm Attea* is reflected in *Chickasaw Nation*. There, this Court, in the specific context of motor fuel taxation, emphasized the importance of identifying the economic actor on whom a tax's legal incidence falls and drew a distinction between "attempts to compel Indians to collect and remit taxes actually imposed on non-Indians" as opposed to "attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians." 515 U.S. at 458. It then cited *Colville* and *Milhelm Attea*, for the proposition that "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax" and that "if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Id.* at 459.

Immediately following the citation to *Milhelm Attea*, this Court held that "the inquiry proper here is whether

the legal incidence of Oklahoma's fuels tax rests on the Tribe (as retailer) or on some *other* transactors – here, the *wholesalers* who sell to the Tribe *or* the *consumers* who buy from the Tribe." *Id.* (emphasis added). The Court concluded its analysis with the observation that "[j]udicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Id.*

Synthesis of the reasoning in *Milhelm Attea* and *Chickasaw Nation* results in a straightforward rule: States may impose the legal incidence of a fuel tax on either the distributor or the consumer even though a tribe or a member is the retailer to the extent the tax is otherwise permissible under ordinary Indian law tax principles. The Indian Trader Statutes may play a role in application of those principles if the dispute's circumstances implicate its animating purposes, but here they do not for the reasons described above.[6]

3) Respondent and *Amici* NCAI argues that the Indian Commerce Clause prohibits the state tax at issue here. In fact, the Indian Commerce Clause offers nothing other than justification for federal legislation affecting Indians. *E.g., Cotton Petroleum* 490 U.S. at 192 ("the central function of the Indian Commerce Clause is to

[6] The burden of the Kansas tax is obviously less than those imposed on tribal retailers in *Colville* and *Moe*, because here Respondent has no reporting or remittance responsibilities. Indeed, the absence of any regulatory responsibilities under the Kansas statute separates this controversy from *Milhelm Attea*, where the New York law required retailers to tender "Tax Exemption Coupons" to their wholesalers upon delivery of cigarette shipments and to require proof from customers at the time of first purchase that they were "qualified Indian consumers." *Id.* at 66-67. Crediting Respondent and the United States' approach thus would fulfill the prophecy in *Milhelm Attea* that barring "any and all state-imposed burdens on Indian traders . . . might well have the perverse consequence of casting greater state tax enforcement burdens on the very reservation Indians whom the Indian Trader Statutes were enacted to protect." *Id.* at 74.

provide Congress with plenary power to legislate in the field of Indian affairs. . . ."). Further, the Indian Commerce Clause possesses no dormant component.

Imposition of a state's fuel tax off-reservation does not violate the Indian Commerce Clause any more than it violates the Interstate Commerce Clause. Judicial review of state taxation is "intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Moreover, the State is not automatically barred from applying non-discriminatory tax laws even though they may significantly touch the political and economic interests of the tribes. *Colville*, 447 U.S. 134 at 157 (discussing Indian Commerce Clause). Only *undue* discrimination is forbidden. *Id.*

The burden placed on Respondent's fuel supplier here is not applied in a discriminatory manner; it is applied to all importers, manufacturers and distributors of fuel into Kansas, and it is applied off-reservation.

4) Respondent also complains about the unfairness of double taxation.[7] This, however, does not constitute a recognized legal argument. The federal government taxes

[7] Respondent discusses a 1992 "agreement" between Kansas and Respondent, allegedly to address taxation by the State and Respondent of the same transaction. (Respondent's Br. 7, 26); *see also Amicus Curiae* Nat'l Intertribal Tax Alliance Br. 9-10. Former Kansas Governor Joan Finney did sign an agreement with Respondent (she also signed similar agreements with all resident tribes in Kansas). Respondent fails to mention, however, that under Kansas law, in order to be in full force and effect such agreements had to be ratified by the Kansas Legislature. The agreement was never validated by the Kansas Legislature. *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992). The agreement, even had it been ratified, would have expired in 1996 and is no longer of any use other than as a historical curiosity, and should not, in any fashion, have a bearing on the outcome of this case. *See Sac and Fox Nation of Missouri v. Lafaver*, 31 F. Supp.2d 1298, 1302-03 (D. Kan. 1998).

fuel, tires, alcohol, cigarettes, and so do states, and the consumer pays for all of it. Except for consumers, no one "pays" taxes. The costs of taxes are built into selling prices, which is how the costs of taxes are disbursed. The fact that the federal government, the State and Respondent may all tax the same transaction does not invalidate the state's tax. *Colville*, 447 U.S. 134, 158 (1980) (state tax not invalid where state and tribal taxes imposed on same transaction), and *Cotton Petroleum,* 490 U.S. 163 (1989) (state tax not invalidated simply because tribe taxes the same commodity).

In essence, Respondent claims that imposition of the state tax causes it to be harmed economically. However, this has never been the standard. In *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937), this Court upheld a state tax on one of its resident's use of goods purchased in another State without regard to the fact that the other State's competitive ability to tax the same transaction was obviously reduced. The Court observed that such a tax was permissible even if no credit for the other state tax were allowed. *Id. See also Colville* at 151.

Respondent also argues that the State tax infringes on its governmental interests. However, there is no direct conflict between the State and tribal schemes, since each is free to impose its taxes without ousting the other. Although taxes may be imposed for non-revenue governmental purposes, Respondent has failed to show non-revenue purposes for its tax, and there is no intent on the part of Congress to preempt the state tax here. While some tribal ordinances may regulate the marketing of gasoline by the tribal enterprise, the State does not interfere with Respondent's power when it simply imposes its tax on receipts by distributors, importers or manufacturers off-reservation. *See Colville* at 158-59.

CONCLUSION

For the foregoing reasons, and for those stated in the Petitioner's Brief and Petition, Kansas respectfully requests that the Court reverse the court of appeals.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE *v.* PRAIRIE BAND POTAWATOMI NATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–631. Argued October 3, 2005—Decided December 6, 2005

Kansas' motor fuel tax applies to the receipt of fuel by off-reservation non-Indian distributors who subsequently deliver it to the gas station owned by, and located on the Reservation of, the Prairie Band Potawatomi Nation (Nation). The station is meant to accommodate reservation traffic, including patrons driving to the casino the Nation owns and operates there. Most of the station's fuel is sold to such patrons, but some sales are made to persons living or working on the reservation. The Nation's own tax on the station's fuel sales generates revenue for reservation infrastructure. The Nation sued for declaratory judgment and injunctive relief from the State's collection of its tax from distributors delivering fuel to the reservation. Granting the State summary judgment, the District Court determined that the balance of state, federal, and tribal interests tilted in favor of the State under the test set forth in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136. The Tenth Circuit reversed, agreeing with the Nation that the Kansas tax is an impermissible affront to its sovereignty. The court reasoned that the Nation's fuel revenues were derived from value generated primarily on its reservation—*i.e.*, the creation of a new fuel market by virtue of the casino—and that the Nation's interests in taxing this reservation-created value to raise revenue for reservation infrastructure outweighed the State's general interest in raising revenues.

Held: Because Kansas' motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians, the tax is valid and poses no affront to the Nation's sovereignty. The *Bracker* interest-balancing test does not apply to a tax that results from an off-reservation transaction between non-Indians. Pp. 4–18.

Syllabus

1. The Kansas tax is imposed on non-Indian distributors based upon their off-reservation receipt of motor fuel, not on the on-reservation sale and delivery of that fuel. Pp. 4–12.

(a) Under this Court's Indian tax immunity cases, the "who" and the "where" of a challenged tax have significant consequences. "The initial and frequently dispositive question . . . is *who* bears [a tax's] legal incidence," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 458 (emphasis added). Moreover, the States are categorically barred from placing a tax's legal incidence "*on a tribe or on tribal members* for sales made *inside Indian country*" without congressional authorization. *Id.*, at 459 (emphasis added). Even when a State imposes a tax's legal incidence on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. See, *e.g.*, *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160. Pp. 4–5.

(b) The Court rejects the Nation's argument that it is entitled to prevail under *Chickasaw*'s categorical bar because the fairest reading of the Kansas statute is that the tax's legal incidence actually falls on the Tribe on the reservation. Under the statute, the tax's incidence is expressly imposed on the distributor that first receives the fuel. Such "dispositive language" from the state legislature is determinative of who bears a state excise tax's legal incidence. *Chickasaw*, *supra*, at 461. Even absent such "dispositive language," the Court would nonetheless conclude that the tax's legal incidence is on the distributor because Kansas law makes clear that it is the distributor, not the retailer, that is liable for the tax. The lower courts and the Kansas agency charged with administering the motor fuel tax reached the same conclusion. *Kaul* v. *Kansas Dept. of Revenue*, 266 Kan. 464, 970 P. 2d 60, distinguished. Pp. 5–8.

(c) Also rejected is the Nation's alternative argument that the *Bracker* test must be applied irrespective of who bears the Kansas tax's legal incidence because the tax arises as a result of the *on-reservation* sale and delivery of fuel. The Nation presented a starkly different, and correct, interpretation of the statute in the Tenth Circuit, arguing that the balancing test is appropriate even though the tax's legal incidence is imposed on the Nation's non-Indian distributor and is triggered by the distributor's receipt of fuel *outside the reservation*. The Nation's argument here is rebutted by provisions of the Kansas statute demonstrating that the only taxable event occurs when the distributor first receives the fuel and by a final determination by the State reaching the same conclusion. The Nation's theory that the existence of statutory deductions for certain postreceipt transactions make it impossible for a distributor to calculate its ulti-

Syllabus

mate tax liability without knowing whether, where, and to whom the fuel is ultimately sold or delivered suffers from several conceptual defects. For example, availability of the deductions does not change the nature of the taxable event, the distributor's receipt of the fuel. Pp. 8–12.

2. The Tenth Circuit erred in concluding that the Kansas tax is nevertheless subject to *Bracker*'s test. That test applies only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U. S., at 144. It has never been applied where, as here, a state tax imposed on a non-Indian arises from a transaction occurring off the reservation. The Court's Indian tax immunity cases counsel against such an application. Pp. 12–18.

(a) Limiting the *Bracker* test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with this Court's unique Indian tax immunity jurisprudence, which relies "heavily on the doctrine of tribal sovereignty [giving] state law 'no role to play' within a tribe's territorial boundaries." *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U. S. 114, 123–124. The Court has taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country. *E.g.*, *Chickasaw*, 515 U. S. 450. In such cases, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149. If a State may apply a nondiscriminatory tax to Indians who have gone beyond the reservation's boundaries, it may also apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances, *Bracker* is inapplicable. Cf. *Arizona Dept. of Revenue* v. *Blaze Constr. Co.*, 526 U. S. 32, 37. The application of the test here is also inconsistent with the Court's efforts to establish "bright line standard[s]" in the tax administration context. *Ibid.* The Nation is not entitled to interest balancing by virtue of its claim that the Kansas tax interferes with the Nation's own motor fuel tax. This is ultimately a complaint about the state tax's downstream economic consequences. The Nation cannot invalidate that tax by complaining about a decrease in its revenues. See, *e.g.*, *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 156. Nor would the Court's analysis change if legal significance were accorded the Nation's decision to label a portion of its gas station's revenues as tax proceeds. See *id.*, at 184, n. 9. Pp. 12–17.

(b) This Court rejects the Nation's contention that the Kansas tax is invalid notwithstanding the *Bracker* test's inapplicability be-

Syllabus

cause it exempts from taxation fuel sold or delivered to state and federal sovereigns and is therefore impermissibly discriminatory. The Nation is not similarly situated to the exempted sovereigns. While Kansas' tax pays for roads and bridges on the Nation's reservation, including the main highway used by casino patrons, Kansas offers no such services to the several States or the Federal Government. Moreover, to the extent Kansas retailers bear the tax's cost, that burden applies equally to all retailers within the State regardless of whether they are located on a reservation. P. 18.

379 F. 3d 979, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which KENNEDY, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–631

JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER *v.* PRAIRIE BAND POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[December 6, 2005]

JUSTICE THOMAS delivered the opinion of the Court.

The State of Kansas imposes a tax on the receipt of motor fuel by fuel distributors within its boundaries. Kansas applies that tax to motor fuel received by non-Indian fuel distributors who subsequently deliver that fuel to a gas station owned by, and located on, the Reservation of the Prairie Band Potawatomi Nation (Nation). The Nation maintains that this application of the Kansas motor fuel tax is an impermissible affront to its sovereignty. The Court of Appeals agreed, holding that the application of the Kansas tax to fuel received by a non-Indian distributor, but subsequently delivered to the Nation, was invalid under the interest-balancing test set forth in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980). But the *Bracker* interest-balancing test applies only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Id.*, at 144. It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation. Accordingly, we reverse.

I

The Nation is a federally recognized Indian Tribe whose reservation is on United States trust land in Jackson County, Kansas. The Nation owns and operates a casino on its reservation. In order to accommodate casino patrons and other reservation-related traffic, the Nation constructed, and now owns and operates, a gas station on its reservation next to the casino. Seventy-three percent of the station's fuel sales are made to casino patrons, while 11 percent of the station's fuel sales are made to persons who live or work on the reservation. The Nation purchases fuel for its gas station from non-Indian distributors located off its reservation. Those distributors pay a state fuel tax on their initial receipt of motor fuel, Kan. Stat. Ann. §79–3408 (2003 Cum. Supp.),[1] and pass along the cost of that tax to their customers, including the Nation.[2]

The Nation sells its fuel within 2 cents per gallon of the prevailing market price. *Prairie Band Potawatomi Nation* v. *Richards*, 379 F. 3d 979, 982 (CA10 2004). It does so notwithstanding the distributor's decision to pass along the cost of the State's fuel tax to the Nation, and the Nation's decision to impose its own tax on the station's fuel sales in the amount of 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). *Id.*, at 982. The Nation's fuel tax generates approximately

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[1]The Kansas Legislature recently amended the fuel tax statute. 2005 Kan. Sess. Laws ch. 46. The text of the sections to which we refer remains the same, although the subsection numbers have changed. For consistency, our subsection references are to the 2003 version applied by the lower courts and cited by the parties.

[2]The record does not clearly establish whether the distributor passed along the cost of the tax to the Nation's gas station. At oral argument, petitioner acknowledged that the record was unclear, but represented that the distributor was in fact passing along the cost of the tax to the Nation.

$300,000 annually, funds that the Nation uses for "'constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation,'" including the access road between the state-funded highway and the casino. *Ibid.*

The Nation brought an action in Federal District Court for declaratory judgment and injunctive relief from the State's collection of motor fuel tax from distributors who deliver fuel to the reservation. The District Court granted summary judgment in favor of the State. Applying the *Bracker* interest-balancing test, it determined that the balance of state, federal, and tribal interests tilted in favor of the State. The court reached this determination because "it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors," *Prairie Band Potawatomi Nation* v. *Richards*, 241 F. Supp. 2d 1295, 1311 (Kan. 2003), and because the ultimate purchasers of the fuel, non-Indian casino patrons, receive the bulk of their governmental services from the State, *id.*, at 1309. The court held that the State's tax did not interfere with the Nation's right of self-government, adding that "a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business." *Id.*, at 1311.

The Court of Appeals for the Tenth Circuit reversed. 379 F. 3d 979 (2004). It determined that, under *Bracker*, the balance of state, federal, and tribal interests favored the Tribe. The Tenth Circuit reasoned that the Nation's fuel revenues were "derived from value generated primarily on its reservation," 379 F. 3d, at 984—namely, the creation of a new fuel market by virtue of the presence of the casino—and that the Nation's interests in taxing this reservation-created value to raise revenue for reservation infrastructure outweighed the State's "general interest in

raising revenues," *id.*, at 986. We granted certiorari, 543 U. S. 1186 (2005), and now reverse.

II

Although we granted certiorari to determine whether Kansas may tax a non-Indian distributor's *off-reservation* receipt of fuel without being subject to the *Bracker* interest-balancing test, Pet. for Cert. i, the Nation maintains that Kansas' "tax is imposed not on the off-reservation receipt of fuel, but on its *on-reservation sale and delivery*," Brief for Respondent 11 (emphasis in original). As the Nation recognizes, under our Indian tax immunity cases, the "who" and the "where" of the challenged tax have significant consequences. We have determined that "[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 458 (1995) (emphasis added), and that the States are categorically barred from placing the legal incidence of an excise tax *"on a tribe or on tribal members* for sales made *inside Indian country*" without congressional authorization, *id.*, at 459 (emphasis added). We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. See 448 U. S. 136 (holding that state taxes imposed on on-reservation logging and hauling operations by non-Indian contractor are invalid under the interest-balancing test); cf. *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980) (holding that the Indian trader statutes pre-empted Arizona's tax on a non-Indian seller's on-reservation sales).

The Nation maintains that it is entitled to prevail under the categorical bar articulated in *Chickasaw* because "[t]he fairest reading of the statute is that the legal inci-

dence of the tax actually falls on the Tribe [on the reservation]." Brief for Respondent 17, n. 5. The Nation alternatively maintains it is entitled to prevail even if the legal incidence of the tax is on the non-Indian distributor because, according to the Nation, the tax arises out of a distributor's on-reservation transaction with the Tribe and is therefore subject to the *Bracker* balancing test. Brief for Respondent 15. We address the "who" and the "where" of Kansas' motor fuel tax in turn.

A

Kansas law specifies that "the incidence of [the motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.). We have suggested that such "dispositive language" from the state legislature is determinative of who bears the legal incidence of a state excise tax. *Chickasaw*, *supra*, at 461. But even if the state legislature had not employed such "dispositive language," thereby requiring us instead to look to a "fair interpretation of the taxing statute as written and applied," *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U. S. 9, 11 (1985) *(per curiam)*, we would nonetheless conclude that the legal incidence of the tax is on the distributor.

Kansas law makes clear that it is the distributor, rather than the retailer, that is liable to pay the motor fuel tax. Section 79–3410(a) (1997) provides, in relevant part, that "[e]very distributor . . . shall compute and shall pay to the director . . . the amount of [motor fuel] taxes due to the state." While the distributors are "entitled" to pass along the cost of the tax to downstream purchasers, see §79–3409 (2003 Cum. Supp.), they are not required to do so. In sum, the legal incidence of the Kansas motor fuel tax is on the distributor. The lower courts reached the same conclusion. 379 F. 3d, at 982 ("The Kansas legislature structured the tax so that its legal incidence is placed on non-

Indian distributors"); 241 F. Supp. 2d, at 1311 ("[I]t is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors"); see also *Sac and Fox Nation of Missouri* v. *Pierce*, 213 F. 3d 566, 578 (CA10 2000) ("[T]he legal incidence of the [Kansas] tax law as presently written falls on the fuel distributors rather than on the Tribes"); *Winnebago Tribe of Nebraska* v. *Kline*, 297 F. Supp. 2d 1291, 1294 (Kan. 2004) ("Under the Kansas statutory scheme, the legal incidence of the state's fuel tax falls on the 'distributor of first receipt' of such fuel"); *Sac and Fox Nation of Missouri* v. *LaFaver*, 31 F. Supp. 2d 1298, 1307 (Kan. 1998) ("[T]he statutes are extremely clear in providing that the tax in question is imposed upon the distributor"). And the Kansas Department of Revenue, the state agency charged with administering the motor fuel tax, has concluded likewise. See Letter from David J. Heinemann, Office of Administrative Appeals, to Mark Burghart, Written Final Determination in Request for Informal Conference for Reconsideration of Agency Action, *Davies Oil Co., Inc.*, Docket No. 01–970 (Jan. 3, 2002) (hereinafter Kansas Dept. of Revenue Letter) ("The legal incidence of the Kansas fuel tax rests with Davies, the distributor, who is up-stream from Nation, the retailer").

The United States, as *amicus*, contends that this conclusion is foreclosed by the Kansas Supreme Court's decision in *Kaul* v. *Kansas Dept. of Revenue*, 266 Kan. 464, 970 P. 2d 60 (1998). The United States reads *Kaul* as holding that the legal incidence of Kansas' motor fuel tax rests on the Indian retailers, rather than on the non-Indian distributors. And, under the United States' view, so long as the Kansas Supreme Court's "'definitive determination as to the operating incidence'" of its fuel tax is "'consistent with the statute's reasonable interpretation,'" it should be "'deemed conclusive.'" Brief for United States as *Amicus Curiae* 10 (quoting *Gurley* v. *Rhoden*, 421 U. S. 200, 208

(1975)).

We disagree with the United States' interpretation of *Kaul*. In *Kaul*, two members of the Citizen Band Potawatomi Tribe of Oklahoma sought to enjoin the enforcement of Kansas' fuel tax on fuel delivered to their gas station located on the Prairie Band Potawatomi Tribe of Kansas' Reservation. The Kansas Supreme Court determined that the station owners had standing to challenge the tax because the statute provided that the distributor was entitled to "'charge and collect such tax . . . as a part of the selling price.'" *Kaul, supra*, at 474, 970 P. 2d, at 67 (quoting Kan. Stat. Ann. §79–3409 (1995); emphasis deleted). The court determined that the station owners were not entitled to an injunction, however, because they were not members of a Kansas Tribe and thus there had "been no showing by Retailers that payment of fuel tax to Kansas interferes with the self-government of a Kansas tribe or a Kansas tribal member." 266 Kan., at 464, 970 P. 2d, at 69. The court then noted that "the legal incidence of the tax on motor fuel rests on nontribal members and does not affect the Potawatomi Indian reservation within the state of Kansas." *Ibid.*

Kaul does not foreclose our determination that the distributor bears the legal incidence of the Kansas motor fuel tax. As an initial matter, it is unclear whether the court's reference to "nontribal members" is a reference to the non-tribal-member retailers or the non-tribal-member distributors. At the very least, *Kaul*'s imprecise language cannot be characterized as a definitive determination. Moreover, the 1998 amendments to the Kansas fuel provisions, including the amendment to §79–3408(c) that provides that "the incidence of this tax is imposed on the distributor," were not applied in *Kaul*. *Id.*, at 473, 970 P. 2d, at 66 (identifying provisions that were repealed in 1998 as being "in effect during the period relevant to this case"); *id.*, at 474, 970 P. 2d, at 67 (noting that a "critical

statute" to its holding was the 1995 version of §79–3409, which was amended in 1998). Accordingly, *Kaul* did not speak authoritatively on the provisions before us today.

B

The Nation maintains that we must apply the *Bracker* interest-balancing test, irrespective of the identity of the taxpayer (*i.e.*, the party bearing the legal incidence), because the Kansas fuel tax arises as a result of the *on-reservation* sale and delivery of the motor fuel. See Brief for Respondent 15. Notably, however, the Nation presented a starkly different interpretation of the statute in the proceedings before the Court of Appeals, arguing that "[t]he balancing test is appropriate even though the legal incidence of the tax is imposed on the Nation's non-Indian distributor and is triggered by the distributor's receipt of fuel *outside the reservation*." Appellant's Reply Brief in No. 03–3218 (CA10), p. 3 (emphasis added); see also 241 F. Supp. 2d, at 1311 (District Court observing that "it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors"). A "fair interpretation of the taxing statute as written and applied," *Chemehuevi Tribe*, 474 U. S., at 11, confirms that the Nation's interpretation of the statute before the Court of Appeals was correct.

As written, the Kansas fuel tax provisions state that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein . . . ." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.). Under this provision, the distributor who initially receives the motor fuel is liable for payment of the fuel tax, and the distributor's tax liability is determined by calculating the amount of fuel received by the distributor.

Section 79–3410(a) (1997) confirms that it is the distributor's off-reservation receipt of the motor fuel, and not any subsequent event, that establishes tax liability. That section provides:

> "[E]very distributor, manufacturer, importer, exporter or retailer of motor-vehicle fuels or special fuels, on or before the 25th day of each month, shall render to the director . . . a report certified to be true and correct showing the number of gallons of motor-vehicle fuels or special fuels received by such distributor, manufacturer, importer, exporter or retailer during the preceding calendar month . . . . Every distributor, manufacturer or importer within the time herein fixed for the rendering of such reports, shall compute and shall pay to the director at the director's office the amount of taxes due to the state on all motor-vehicle fuels or special fuels received by such distributor, manufacturer or importer during the preceding calendar month."

Thus, Kansas law expressly provides that a distributor's monthly tax obligations are determined by the amount of fuel received by the distributor during the preceding month. See *Kline*, 297 F. Supp. 2d, at 1294 ("The distributor must compute and remit the tax each month for the fuel received by the distributor in the State of Kansas").

The Nation disagrees. It contends that what is taxed is not the distributors' (off-reservation) receipt of the fuel, but rather the distributors' use, sale, or delivery of the motor fuel—in this case, the distributors' (on-reservation) sale or delivery to the Nation. The Nation grounds support for this proposition in §79–3408(a) (2003 Cum. Supp.). That section provides that "[a] tax . . . is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever." But this section

cannot be read in isolation. If it were, it would permit Kansas to tax the same fuel multiple times—namely, every time fuel is sold, delivered, or used. Section 79–3408(a) must be read in conjunction with subsection (c), which specifies that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel *and such taxes shall be paid but once.*" (Emphasis added.) The identity of the single, taxable event is revealed in the very next sentence of subsection (c), which provides that "[s]uch tax shall be computed on all . . . fuels *received by each distributor.*" (Emphasis added.) In short, the "use, sale or delivery" that triggers tax liability is the sale or delivery of the fuel to the distributor. The Kansas Department of Revenue has issued a final determination reaching the same conclusion. See Kansas Dept. of Revenue Letter ("[P]ursuant to the Kansas Motor Fuel Tax Act . . . the state fuel tax was imposed on Davies, a distributor, *when Davies first received the fuel at its business, a site located off of Nation's reservation*" (emphasis added)).

The Nation claims further support for its interpretation of the statute in §79–3408(d) (2003 Cum. Supp.). Section 79–3408(d) permits distributors to obtain deductions from the Kansas motor fuel tax for certain postreceipt transactions, such as sale or delivery of fuel for export from the State and sale or delivery of fuel to the United States. §§79–3408(d)(1)–(2). The Nation argues that these exemptions make it impossible for a distributor to calculate its "ultimate tax liability" without knowing "whether, where, and to whom the fuel is ultimately sold or delivered." Brief for Respondent 15. The Nation infers from these provisions that the taxable event is actually the distributors' postreceipt delivery of fuel to retailers such as the Nation, rather than the distributors' initial receipt of the fuel.

The Nation's theory suffers from a number of conceptual defects. First, under Kansas law, a distributor must pay

the tax even for fuel that sits in its inventory—fuel that is not (or at least has not yet been) used, sold, or delivered by the distributor.[3] But the Nation's interpretation presumes that the tax is owed *only* on a distributor's postreceipt use, sale, or delivery of fuel. As this interpretation cannot be reconciled with the manner in which the Kansas motor fuel tax is actually applied, it must be rejected.[4] Second,

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[3]This understanding of the application of the Kansas fuel tax is confirmed by the form that fuel distributors are required to fill out each month pursuant to Kan. Stat. Ann. §79–3410 (1997). See Kansas Form MF–52, available at http://www.ksrevenue.org/pdf/forms/mf52.pdf (as visited Nov. 21, 2005, and available in Clerk of Court's case file). The form instructs distributors to enter in line 1 "the total net gallons of gasoline, gasohol and special fuel received or imported" during the preceding month. *Id.*, at 2. The distributors may then "[e]nter the deductions that apply to your business" in lines 2(a)-to-(e) for the preceding month. Those deductions include "[n]et gallons of fuel exported from Kansas," "[n]et gallons of fuel sold to the U. S. Government," "[n]et gallons of fuel sold for aviation purposes," and "[n]et gallons of dyed diesel fuel *received* for the month," the very deductions described in §79–3408(d), *ibid.* (emphasis added). The distributor's tax liability is then calculated by subtracting the total deductions from the total fuel received, and applying the 2.5 percent handling allowance to the difference. Thus, the event that generates a distributor's tax liability is its receipt of fuel. And the distributor must pay tax on that fuel even if it is not subsequently delivered or sold. While a distributor may decrease its tax liability by engaging in transactions that entitle it to deductions, such as by selling or delivering fuel to an exempt entity like the United States, its tax liability is unaffected by sales or deliveries to nonexempt entities like the Nation.

[4]Indeed, the dissent acknowledges that tax is owed on fuel a distributor receives and holds in inventory—and thus implicitly concedes that the distributors' off-reservation receipt of motor fuel is the event that gives rise to tax liability. See *post*, at 5 (opinion of GINSBURG, J.). While the dissent contends that such tax is ultimately "effectively offset" by a subsequent delivery of the inventoried fuel, *ibid.*, the dissent does not explain the meaning of this opaque contention. A distributor's subsequent delivery of fuel to the Nation or any other fuel retailer in Kansas has *no effect* on tax that it has already paid in a preceding month. Indeed, the distributor does not report delivery to retailers on its monthly tax return. See Kansas Form MF–52. And a

the availability of tax deductions does not change the nature of the taxable event, here the distributor's receipt of the fuel. By analogy, an individual federal income taxpayer may reduce his tax liability by paying home mortgage interest. But that entitlement does not render the taxable event anything other than the receipt of income by the taxpayer. See 26 U. S. C. §1 (2000 ed. and Supp. II), §163(h) (2000 ed.); cf. *North American Oil Consol.* v. *Burnet*, 286 U. S. 417, 424 (1932) (federal income tax liability arises when "a taxpayer . . . has received income").

Finally, the Nation contends that its interpretation of the statute is supported by Kan. Stat. Ann. §79–3417 (1997), which permits a refund—in certain circumstances—for destroyed fuel. However, the Nation's interpretation is actually foreclosed by that section. Section 79–3417 entitles a distributor to a "refund from the state of the amount of motor-vehicle fuels or special fuels tax paid on any . . . fuels of 100 gallons or more in quantity, which are lost or destroyed at any one time while such distributor is the owner thereof," provided the distributor supplies the required notification and documentation to the State. This section illustrates that a distributor pays taxes for fuel in its possession that it has not delivered or sold, and is only entitled to the refund described in this section for tax it has already paid on fuel that is subsequently destroyed. While this section does not specify the event that gives rise to the distributor's tax liability, it forecloses the Nation's contention that such liability does not arise until fuel is sold or delivered to a nonexempt entity.

III

Although Kansas' fuel tax is imposed on non-Indian distributors based upon those distributors' off-reservation

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distributor must pay the tax even if the fuel is *never* delivered.

receipt of motor fuel, the Tenth Circuit concluded that the tax was nevertheless still subject to the interest-balancing test this Court set forth in *Bracker*, 448 U. S. 136. As *Bracker* itself explained, however, we formulated the balancing test to address the "difficult questio[n]" that arises when "a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*." *Id.*, at 144–145 (emphasis added). The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. And although we have never addressed this precise issue, our Indian tax immunity cases counsel against such an application.

A

We have applied the balancing test articulated in *Bracker* only where "the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members," *Arizona Dept. of Revenue* v. *Blaze Constr. Co.*, 526 U. S. 32, 37 (1999), on the reservation. See *Bracker*, *supra* (motor carrier license and use fuel taxes imposed on on-reservation logging and hauling operations by non-Indian contractor); *Department of Taxation and Finance of N. Y.* v. *Milhelm Attea & Bros.*, 512 U. S. 61 (1994) (various taxes imposed on non-Indian purchasers of goods retailed on-reservation); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163 (1989) (state severance tax imposed on non-Indian lessee's on-reservation production of oil and gas); *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of N. M.*, 458 U. S. 832 (1982) (state gross receipts tax imposed on private contractor's proceeds from the construction of a school on the reservation); *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980) (cigarette and sales taxes imposed on on-reservation purchases by nonmembers); *Central Machinery Co.*, 448 U. S. 160 (tax imposed on on-reservation sale

of farm machinery to Tribe). Similarly, the cases identified in *Bracker* as supportive of the balancing test were exclusively concerned with the on-reservation conduct of non-Indians. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965) (gross proceeds tax imposed on non-Indian retailer on Navajo Indian Reservation); *Thomas* v. *Gay*, 169 U. S. 264 (1898) (state property tax imposed on cattle owned by non-Indian lessees of tribal land); *Williams* v. *Lee*, 358 U. S. 217 (1959) (holding the state courts lacked jurisdiction over dispute between non-Indian, on-reservation retailer and Indian debtors).[5]

Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a

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[5]Our recent discussion in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450 (1995), regarding the application of the interest-balancing test to motor fuel taxes is not to the contrary. In *Chickasaw*, we noted in dicta that, "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the state may impose its levy, and may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Id.*, at 459 (citation omitted). *Chickasaw* did not purport to expand the applicability of *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980), to an off-reservation tax on non-Indians. Indeed, the quoted sentence reveals that *Chickasaw* discussed the applicability of the interest-balancing test in the context of a tax that is collected by the tribe—a tax that necessarily arises from on-reservation conduct.

Moreover, in purporting to craft a "'bright-line standard'" in that case, we noted that Oklahoma "generally is free" to impose the legal incidence of its motor fuel tax on the consumer—who purchases fuel on the reservation—and then require the Indian retailers to "'collect and remit the levy.'" 515 U. S., at 460. If Oklahoma would have been free to impose the legal incidence of its fuel tax downstream from the Indian retailers, then Kansas should be equally free to impose the legal incidence of its fuel tax upstream from Indian retailers notwithstanding the applicability of the interest-balancing test. Indeed, the *Chickasaw* dicta should apply *a fortiori* here: the upstream approach is *less* burdensome on the Tribe because it does not include the collecting and remitting requirements that typically, and permissibly, accompany a consumer tax.

tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence. We have explained that this jurisprudence relies "heavily on the doctrine of tribal sovereignty . . . which historically gave state law 'no role to play' within a tribe's territorial boundaries." *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U. S. 114, 123–124 (1993) (quoting *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 168 (1973)). We have further explained that the doctrine of tribal sovereignty, which has a "significant geographical component," *Bracker*, *supra*, at 151, requires us to "revers[e]" the "'general rule'" that "'exemptions from tax laws should . . . be clearly expressed.'" *Sac and Fox*, *supra*, at 124 (quoting *McClanahan*, *supra*, at 176). And we have determined that the geographical component of tribal sovereignty "'provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'" *Sac and Fox*, *supra*, at 124 (quoting *McClanahan*, *supra*, at 172). Indeed, the particularized inquiry we set forth in *Bracker* relied specifically on that backdrop. See 448 U. S., at 144–145 (noting that where "a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation* . . . we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" (emphasis added)).

We have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country. Without applying the interest-balancing test, we have permitted the taxation of the gross receipts of an off-reservation, Indian-owned ski resort, *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), and the taxation of income earned by Indians working on-reservation but living off-reservation, *Chickasaw*, 515 U. S. 450. In these cases, we have concluded that "[a]bsent express

federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache*, *supra*, at 148–149; *Chickasaw*, *supra*, at 465 (quoting *Mescalero Apache*, *supra*, at 148–149). If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances, the interest-balancing test set forth in *Bracker* is inapplicable. Cf. *Blaze Constr.*, 526 U. S., at 37 (declining to apply the *Bracker* interest-balancing test "where a State seeks to tax a transaction [on-reservation] between the Federal Government and its non-Indian private contractor").

The application of the interest-balancing test to the Kansas motor fuel tax is not only inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish "bright-line standard[s]" in the context of tax administration. *Ibid.* ("The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations"); cf. *Chickasaw*, *supra*, at 460 (noting that the legal incidence test "'provide[s] a reasonably bright-line standard'"); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 267–268 (1992). Indeed, we have recognized that the *Bracker* interest-balancing test "only cloud[s]" our efforts to establish such standards. *Blaze Constr.*, *supra*, at 37. Under the Nation's view, however, any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing. Such an expansion of the application of the

Bracker test is not supported by our cases.

Nor is the Nation entitled to interest balancing by virtue of its claim that the Kansas motor fuel tax interferes with its own motor fuel tax. As an initial matter, this is ultimately a complaint about the downstream economic consequences of the Kansas tax. As the owner of the station, the Nation will keep every dollar it collects above its operating costs. Given that the Nation sells gas at prevailing market rates, its decision to impose a tax should have no effect on its net revenues from the operation of the station; it should not matter whether those revenues are labeled "profits" or "tax proceeds." The Nation merely seeks to increase those revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues. See *Colville*, 447 U. S., at 156 ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' *Williams* v. *Lee*, 358 U. S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving"). Nor would our analysis change if we accorded legal significance to the Nation's decision to label a portion of the station's revenues as tax proceeds. See *id.*, at 184, n. 9 (Rehnquist, J., concurring in part, concuring in result in part, and dissenting in part) ("When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority").[6]

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[6]These authorities also foreclose the Nation's contention that the Kansas motor fuel tax is invalid, irrespective of the applicability of *Bracker*, 448 U. S. 136, because it interferes with the Nation's right to

B

Finally, the Nation contends that the Kansas motor fuel tax is invalid notwithstanding the inapplicability of the interest-balancing test, because it "exempts from taxation fuel sold or delivered to all other sovereigns," and is therefore impermissibly discriminatory. Brief for Respondent 17–20 (emphasis deleted); Kan. Stat. Ann. §§79–3408(d)(1)–(2) (2003 Cum. Supp.). But the Nation is not similarly situated to the sovereigns exempted from the Kansas fuel tax. While Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation's reservation, including the main highway used by the Nation's casino patrons, Kansas offers no such services to the several States or the Federal Government. Moreover, to the extent Kansas fuel retailers bear the cost of the fuel tax, that burden falls equally upon all retailers within the State regardless of whether those retailers are located on an Indian reservation. Accordingly, the Kansas motor fuel tax is not impermissibly discriminatory.

* * *

For the foregoing reasons, we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians. Accordingly, the tax is valid and poses no affront to the Nation's sovereignty. The judgment of the Court of Appeals is reversed.

It is so ordered.

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self government. See Brief for Respondent 45–47.

SUPREME COURT OF THE UNITED STATES

No. 04–631

JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER *v.* PRAIRIE BAND POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[December 6, 2005]

JUSTICE GINSBURG, with whom JUSTICE KENNEDY joins, dissenting.

The Kansas fuel tax at issue is imposed on distributors, passed on to retailers, and ultimately paid by gas station customers. Out-of-state sales are exempt, as are sales to other distributors, the United States, and U. S. Government contractors. Fuel lost or destroyed, and thus not sold, is also exempt. But no statutory exception attends sales to Indian tribes or their members. Kan. Stat. Ann. §§79–3408; 79–3409; 79–3417 (1997 and 2003 Cum. Supp.).

The Prairie Band Potawatomi Nation (hereinafter Nation) maintains a casino and related facilities on its reservation. On nearby tribal land, as an adjunct to its casino, the Nation built, owns, and operates a gas station known as the Nation Station. Some 73% of the Nation Station's customers are casino patrons or employees. *Prairie Band Potawatomi Nation* v. *Richards*, 379 F. 3d 979, 982 (CA10 2004). The Nation imposes its own tax on fuel sold at the Nation Station, pennies per gallon less than Kansas' tax. *Ibid.*[1]

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[1]The Federal Government also imposes a tax on the "removal, entry, or sale" of all motor fuel. 26 U. S. C. §4081(a)(1). Neither the State nor the Nation contests the applicability of this tax to fuel destined for the Nation Station.

Both the Nation and the State have authority to tax fuel sales at the Nation Station. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 137 (1982) (describing "[t]he power to tax [as] an essential attribute of Indian sovereignty[,] . . . a necessary instrument of self-government and territorial management," which "enables a tribal government to raise revenues for its essential services"). As a practical matter, however, the two tolls cannot coexist. 379 F. 3d, at 986. If the Nation imposes its tax on top of Kansas' tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all. In these circumstances, which tax is paramount? Applying the interest-balancing approach described in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980), the Court of Appeals for the Tenth Circuit held that "the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax." 379 F. 3d, at 983. I agree and would affirm the Court of Appeals' judgment.

I

Understanding *Bracker* is key to the inquiry here. *Bracker* addressed the question whether a State should be preempted from collecting otherwise lawful taxes from non-Indians in view of the burden consequently imposed upon a Tribe or its members. In that case, Arizona sought to enforce its fuel-use and vehicle-license taxes against a non-Indian enterprise that contracted with the White Mountain Apache Tribe to harvest timber from reservation forests. 448 U. S., at 138–140. The Court recognized that Arizona's levies raised difficult questions concerning "the boundaries between state regulatory authority and tribal self-government." *Id.*, at 141. Determining whether taxes formally imposed on non-Indians are preempted, the

Court instructed, should not turn "on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.*, at 145. This inquiry is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law," *ibid.*, or "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them,'" *id.*, at 142 (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). Applying the interest-balancing approach, the Court concluded that "the proposed exercise of state authority [was] impermissible" because "it [was] undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe," "the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber," and the state officials were "unable to justify the taxes except in terms of a generalized interest in raising revenue." 448 U. S., at 151.

The Court has repeatedly applied the interest-balancing approach described in *Bracker* in evaluating claims that state taxes levied on non-Indians should be preempted because they undermine tribal and federal interests.[2] In many cases, both pre- and post-*Bracker*, a balancing analysis has yielded a decision upholding application of the state tax in question. See, *e.g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 183–187 (1989) (State permitted to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production); *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134,

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[2]The Court has also applied the interest-balancing approach to other forms of state regulation relating to Indian tribal societies. See, *e.g.*, *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 216–217 (1987) (State prohibited from regulating non-Indian customers of tribal bingo operation); *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 333–343 (1983) (*Mescalero II*) (State barred from enforcing game laws against non-Indians for on-reservation hunting and fishing).

154–159 (1980) (State permitted to tax non-Indians' purchases of cigarettes from on-reservation tribal retailers); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 481–483 (1976) (same). Sometimes, however, particularized inquiry has resulted in a holding that federal or tribal interests are superior. See, *e.g.*, *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of N. M.*, 458 U. S. 832, 843–846 (1982) (State prohibited from imposing gross-receipts tax on a non-Indian contractor constructing an on-reservation tribal school).

Kansas contends that the interest-balancing approach is not suitably employed to assess its fuel tax for these reasons: (1) the Kansas Legislature imposed the legal incidence of the tax on the distributor—here, a non-Indian enterprise—not on retailers or their customers; and (2) the distributor's liability is triggered when it receives fuel from its supplier—a transaction that occurs off-reservation. Reply Brief 2–6. Given these circumstances, Kansas urges and the Court accepts, no balancing is in order. See *ante*, at 12–13; Brief for Petitioner 6, 14–21. It is irrelevant in the State's calculus that its approach would effectively nullify the tribal fuel tax.

I note first that Kansas' placement of the legal incidence of the fuel tax is not as clear and certain as the State suggests and the Court holds. True, the statute states that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.). But the statute declares initially that the tax "is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . used, sold or delivered in this state for any purpose whatsoever," §79–3408(a), and it authorizes distributors to pass on the tax to retailers, §79–3409. Notably, the statute excludes from taxation several "transactions," including the "sale or delivery of motor-vehicle fuel . . . for export from the state of Kansas to any other state or territory or to any foreign

country"; "sale or delivery . . . to the United States"; "sale or delivery . . . to a contractor for use in performing work for the United States"; and "sale or delivery . . . to another duly licensed distributor." §79–3408(d). Kansas also excludes from taxation "lost or destroyed" fuel, which is never sold by the distributor. §79–3417 (1997). These provisions indicate not only that the Kansas Legislature anticipated that distributors would shift the tax burden further downstream. They reveal as well where the Court's analysis of the fuel tax goes awry.

When all the exclusions are netted out, the Kansas tax is imposed not on all the distributor's receipts, but effectively *only* on fuel actually *resold* by the distributor to an in-state nonexempt purchaser. To illustrate: Suppose in January a distributor acquires 100,000 gallons of fuel and promptly sells 80,000 to in-state nonexempt purchasers and 20,000 to exempt purchasers, for example, the United States or a U. S. contractor. The distributor would compute its tax liability by "deducting" the 20,000 gallons, see *ante*, at 11, n. 3, but would *remit tax* only on the 80,000 gallons bought by in-state nonexempt retailers.[3] If the distributor elected to build inventory in January by holding an additional 10,000 gallons for resale in February, Kansas would tax in January, but the distributor would effectively offset in February the tax paid in January on the inventory buildup. Again, in the end, only fuel actu-

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[3]The Court analogizes the fuel excise tax "deduction" of exempt sales to the federal income tax deduction for home mortgage interest. *Ante*, at 12. The analogy is misconceived. An excise tax "deduction" bears no realistic resemblance to a personal income tax deduction provided by Congress for a nonbusiness personal expense. An excise tax "deduction," however, may fairly be compared to the standard income tax treatment of merchandise returns. In any period, goods returned and held for resale offset goods sold, so that only net sales yield gross profits for taxation purposes. See 26 CFR §1.446–1(a)(4)(i) (2005); cf. §1.458–1(g) (adjustments under elective treatment of certain post-year-end returns of magazines, paperback books, and recordings).

ally sold to in-state nonexempt buyers would be burdened by Kansas' fuel tax.[4]

Kansas' attribution of controlling effect to the formal legal incidence of the tax rests in part on the State's misreading of *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450 (1995). See Brief for Petitioner 8, 16–20. The Court in that case distinguished instances in which the legal incidence of a State's excise tax rests on a Tribe or tribal members, from instances in which the legal incidence rests on non-Indians. When "the legal incidence . . . rests on a tribe or on tribal members for sales made inside Indian country," the Court said, "the tax cannot be enforced absent clear congressional authorization." 515 U. S., at 459. This "bright-line standard," *id.*, at 460, is sensitive to the sovereign status of Indian Tribes, and reflects the Court's recognition that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U. S., at 154.[5]

When a State places the legal incidence of its tax on non-Indians, however, no similarly overt disrespect for a Tribe's independence and dignity is displayed. In cases of this genre, *Chickasaw Nation* recognized, the Court has resisted adoption of a categorical rule. In lieu of attributing dispositive significance to the legal incidence, the Court has focused on the particular levy, and has evaluated the federal, state, and tribal interests at stake. 515 U. S., at 459; see *Cotton Petroleum*, 490 U. S., at 176

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[4]If in February, the 10,000 gallons were destroyed and thus not sold, Kansas would nonetheless offset the fuel tax burden as Kan. Stat. Ann. §79–3417 (1997) provides, because these gallons would never be sold to in-state nonexempt buyers.

[5]The standard also accords with our repeated admonition that a State may not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980) (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). Accord *Mescalero II*, 462 U. S., at 332–333; *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 171–172 (1973).

(Instead of a "mechanical or absolute" test, the Court has "applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'" (quoting *Ramah*, 458 U. S., at 838)).

Chickasaw Nation did observe that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U. S., at 460. Kansas took the cue. After our decision in *Chickasaw Nation*, Kansas amended its fuel tax statute to state that "the incidence of this tax is imposed on the distributor." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.); see 1998 Kan. Sess. Laws, ch. 96, §2, pp. 450–451; see also *Kaul* v. *Kansas Dept. of Revenue*, 266 Kan. 464, 474, 970 P. 2d 60, 67 (1998).[6]

Kansas is mistaken, however, regarding the legal significance of this shift. *Chickasaw Nation* clarified only that a State could shift the legal incidence to non-Indians so as to avoid the categorical bar applicable when a state excise tax is imposed directly on a Tribe or tribal members for on-reservation activity. 515 U. S., at 460. At the same time, *Chickasaw Nation* indicated that a shift in the legal incidence of the kind Kansas has legislated would trigger—not foreclose—interest balancing. *Ibid.*[7]

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[6] As earlier observed, *supra*, at 4, Kansas retained the opening declaration that the tax "is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . used, sold or delivered in this state for any purpose whatsoever." Kan. Stat. Ann. §79–3408(a) (2003 Cum. Supp.).

[7] The only "bright-line standard" *Chickasaw Nation* advanced is the categorical bar on tolls imposed directly on Tribes or their members. 515 U. S., at 460. No doubt a tribal retailer may find an upstream state tax on its suppliers less burdensome than a downstream tax on its consumers. See *ante*, at 14, n. 5. But administrative ease is hardly the dispositive consideration. The Court has never limited interest-balancing to state taxes imposed on the non-Indian consumers of tribal

Kansas and the Court heavily rely upon *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973) (*Mescalero I*). That case involved a ski resort operated by the Mescalero Apache Tribe on off-reservation land leased from the Federal Government. This Court upheld New Mexico's imposition of a tax on the gross receipts of the resort. Balancing was not in order, the Court explained, because the Tribe had ventured outside its own domain, and was fairly treated, for gross receipts purposes, just as a non-Indian enterprise would be. In such cases, the Court observed, an express-preemption standard is appropriately applied. As the Court put it: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.*, at 148–149. Accord *Chickasaw Nation*, 515 U. S., at 462–465 (State permitted to tax income of tribal members residing outside Indian Country). Cases of the *Mescalero I* kind, however, do not touch and concern what is at issue in the instant case: taxes formally imposed on nonmembers that nonetheless burden *on-reservation* tribal activity.

Conceding that "we have never addressed th[e] precise issue" this case poses, the Court asserts that "our Indian tax immunity cases counsel against" application of the *Bracker* interest-balancing test to Kansas' fuel tax as it impacts on the Nation Station. *Ante*, at 13. The Court so maintains on the ground that the Kansas fuel tax is imposed on a non-Indian and is unrelated to activity "on the reservation." *Ante*, at 12–16. As earlier explained, see *supra*, at 6–7, one can demur to the assertion that the

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enterprises; it has also applied this approach to state regulation of the non-Indian suppliers of tribal enterprises. See, *e.g.*, *Department of Taxation and Finance of N. Y.* v. *Milhelm Attea & Bros.*, 512 U. S. 61, 73–75 (1994).

legal incidence of the tax falls on the distributor, a nontribal entity. With respect to sales and deliveries to the Nation Station, however, the nontribal entity can indeed be described as "engaged in [an on-reservation] transaction with [a Tribe]." *Arizona Dept. of Revenue* v. *Blaze Constr. Co.*, 526 U. S. 32, 37 (1999).

The reservation destination of fuel purchased by the Nation Station does not show the requisite engagement, in the Court's view, but I do not comprehend why. The destination of the fuel counts not only under §79–3408(a) (2003 Cum. Supp.) (fuel tax "is hereby imposed on . . . all motor vehicle fuels . . . used, sold or delivered in this state").[8] To whom and where the distributor sells are the criteria that determine the "transactions" on which "[n]o tax is . . . imposed," §79–3408(d), and, correspondingly, the transactions on which the tax is imposed. As earlier explained, see *supra*, at 4–6, the tax is in reality imposed only on fuel actually resold by the distributor to an in-state nonexempt purchaser. Here, that purchaser is the Nation Station, plainly an on-reservation venture.[9]

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[8]Because §79–3408(a) (2003 Cum. Supp.) does not aid the Court's theory that the State's tax operates entirely off reservation, the Court essentially reads the provision out of the statute, or treats it as harmless surplus. See *ante*, at 9.

[9]At the Court of Appeals level, the Nation presented no "starkly different interpretation of the statute." *Ante*, at 8. This Court, in citing Appellant's Reply Brief 3 to the contrary, apparently failed to read on. At page 12, the Reply Brief states: "The fact that the state tax is technically imposed off-reservation on a non-Indian is not controlling. The state tax is directed at and burdens reservation value." Moreover, it is surely putting words in the Nation's mouth to assert that "[u]nder the Nation's view . . . any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing." *Ante*, at 16. The Nation itself expressly "does not contend . . . that a non-discriminatory, off-reservation state tax of general applicability may be precluded simply because the tax has an adverse economic impact on a Tribe or its members." Brief for Respondent 1. As the Nation points out and the

Balancing tests have been criticized as rudderless, affording insufficient guidance to decisionmakers. See *Colville*, 447 U. S., at 176 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part) (criticizing the "case-by-case litigation which has plagued this area of law"); Brief for Petitioner 30–32. Pointed as the criticism may be, one must ask, as in life's choices generally, what is the alternative. "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U. S., at 156. No "bright-line" test is capable of achieving such an accommodation with respect to state taxes formally imposed on non-Indians, but impacting on-reservation ventures. The one the Court adopts inevitably means, so long as the State officially places the burden on the non-Indian distributor in cases of this order, the Tribe loses. *Faute de mieux* and absent congressional instruction otherwise, I would adhere to precedent calling for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U. S., at 145.

II

I turn to the question whether the Court of Appeals correctly balanced the competing interests in this case. Kansas and the Nation both assert a substantial interest in using their respective fuel taxes to raise revenue for road maintenance. Weighing competing state and tribal

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Court of Appeals comprehended, "the actual issue presented here [is] the permissibility of a state tax that effectively *nullifies* a Tribe's power to impose a comparable tax on fuel sold at market price by a tribally owned, on-reservation gas station." *Ibid.* (emphasis in the original); see *Prairie Band Potawatomi Nation* v. *Richards*, 379 F. 3d 979, 986 (CA10 2004).

interests in raising revenue for public works, *Colville* observed:

> "While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." 447 U. S., at 156–157.

In *Colville*, it was "painfully apparent" that outsiders had no reason to travel to Indian reservations to buy cigarettes other than the bargain prices tribal smokeshops charged by virtue of their claimed exemption from state taxation. *Id.*, at 154–155. The Court upheld the State of Washington's taxes on cigarette purchases by nonmembers at tribal smokeshops. No "princip[le] of federal Indian law," the Court said, "authorize[s] Indian tribes . . . to market an exception from state taxation to persons who would normally do their business elsewhere." *Id.*, at 155.

This case, as the Court of Appeals recognized, bears scant resemblance to *Colville*. "[I]n stark contrast to the smokeshops in *Colville*," the Nation here is not using its asserted exemption from state taxation to lure non-Indians onto its reservation. 379 F. 3d, at 985. The Nation Station is not visible from the state highway, and it advertises no exemption from the State's fuel tax. Including the Nation's tax, the Nation Station sells fuel "'within 2¢ per gallon of the price prevailing in the local market.'" *Id.*, at 982 (quoting the Nation's expert's report); see also

App. 36–40.[10] The Nation Station's draw, therefore, is neither price nor proximity to the highway; rather, the Nation Station operates almost exclusively as an amenity for people driving to and from the casino.

The Tenth Circuit regarded as valuable to its assessment the opinion of the Nation's expert, which concluded: "'[T]he Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero.'" 379 F. 3d, at 986. Kansas "submitted [no] contradictory evidence" and did not argue that the expert opinion offered by the Nation was "either incorrect or exaggerated." *Ibid.*[11] In this respect, the case is indeed novel. It is the first case in which a Tribe demonstrated below that the imposition of a state tax would prevent the Tribe from imposing its own tax. Cf. *Cotton Petroleum*, 490 U. S., at 185 (state and tribal taxes were not mutually exclusive because "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development").

The Court of Appeals considered instructive this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202 (1987). See 379 F. 3d, at 985. The Court

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[10] Tribes, it should be plain, cannot prevail in the interest-balancing analysis simply because they tax the same product or activity that the State seeks to tax. See *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 156 (1980). Otherwise, "the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." *Id.*, at 155; see *infra*, at 15–16.

[11] At oral argument, it was suggested that the Nation Station might pass on both taxes to its customers if it were willing to forgo some of its profits. Tr. of Oral Arg. 3–6, 25–27, 48–50. This speculation apparently did not take account of the opinion and explanation of the Nation's expert, which stands uncontradicted in the record developed in the lower courts. Moreover, the Nation's counsel informed the Court: "[T]he [T]ribe is being forced right now to subsidize the sales at the [Nation S]tation at a loss, which it's doing for the balance of this litigation." *Id.*, at 25; cf. *ante*, at 17.

there held that tribal and federal interests outweighed state interests in regulating tribe-operated facilities for bingo and other games. *Cabazon*, 480 U. S., at 219–220. Distinguishing *Colville*, the Court pointed out that the Tribes in *Cabazon* "[were] not merely importing a product onto the reservatio[n] for immediate resale to non-Indians"; they had "built modern facilities" and provided "ancillary services" so that customers would come in increasing numbers and "spend extended periods of time" playing their "well-run games." 480 U. S., at 219; see also *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 327, 341 (1983) (*Mescalero II*) (State barred from regulating hunting and fishing on-reservation where the Tribe had constructed a "resort complex" and developed wildlife and land resources).

As in *Cabazon*, so here, the Nation Station is not "merely importing a product onto the reservatio[n] for immediate resale to non-Indians" at a stand-alone retail outlet. 480 U. S., at 219. Fuel sales at the Nation Station are "an integral and essential part of the [Tribe's] on-reservation gaming enterprise." 379 F. 3d, at 984. The Nation built the Nation Station as a convenience for its casino patrons and, but for the casino, there would be no market for fuel in this otherwise remote area. *Id.*, at 982.

The Court of Appeals further emphasized that the Nation's "interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance." *Id.*, at 985. The Nation's fuel revenue comes exclusively from the Nation Station, and that revenue (approximately $300,000 annually) may be used only for "'constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.'" *Id.*, at 985–986 (quoting Prairie Band Potawatomi Law and Order Code §10–6–7 (2003)).

The Nation's interests coincide with "strong federal

interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments." 379 F. 3d, at 986. The United States points to the poor condition of Indian reservation roads, documented in federal reports, conditions that affect not only driving safety, but also the ability to furnish emergency medical, fire, and police services on an expedited basis, transportation to schools and jobs, and the advancement of economic activity critical to tribal self-sufficiency. Brief for United States as *Amicus Curiae* 26; see, *e.g.*, Dept. of Commerce, Bureau of Indian Affairs, TEA–21 Reauthorization Resource Paper: Transportation Serving Native American Lands (May 2003). The shared interest of the Federal Government and the Nation in improving reservation roads is reflected in Department of the Interior regulations implementing the Indian Reservation Roads Program. See 69 Fed. Reg. 43090 (2004); 25 CFR §170 *et seq.* (2005). The regulations aim at enhancing the ability of tribal governments to promote road construction and maintenance. They anticipate that Tribes will supplement federal funds with their own revenues, including funds gained from a "[t]ribal fuel tax." §170.932(d). Because the Nation's roads are integrally related to its casino enterprise, they also further federal interests in tribal economic development advanced by the Indian Gaming Regulatory Act, Pub. L. 100–497, 102 Stat. 2467, 25 U. S. C. §2701 *et seq.*

Against these strong tribal and federal interests, Kansas asserts only its "general interest in raising revenues." 379 F. 3d, at 986. "Kansas' interest," as the Court of Appeals observed, "is not at its strongest." *Id.*, at 987. By effectively taxing the Nation Station, Kansas would be deriving revenue "primarily from value generated on the reservation" by the Nation's casino. *Ibid.* Moreover, the revenue Kansas would gain from applying its tax to fuel destined for the Nation Station appears insubstantial when

compared with the total revenue ($6.1 billion in 2004) the State annually collects through the tax. See *id.*, at 982; Brief for Respondent 12 (observing that "[t]he tax revenues at issue—roughly $300,000 annually—are less than one-tenth of one percent of the total state fuel tax revenues").

The Court asserts that "Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation's reservation." *Ante*, at 18. The record reveals a different reality. According to the affidavit of the Director of the Nation's Road and Bridge Department, Kansas and its subdivisions have failed to provide proper maintenance even on their own roads running through the reservation. App. 79. As a result, the Nation has had to assume responsibility for a steadily growing number of road miles within the reservation (roughly 118 of the 212 total miles in 2000). *Ibid.*; see also Brief for Respondent 3, 40, 44–45. Of greater significance, Kansas expends *none* of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads. 379 F. 3d, at 986–987; cf. *Ramah*, 458 U. S., at 843, n. 7 ("This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the efforts to provide, adequate [tribal services]."). In contrast, Kansas sets aside a significant percentage of its fuel tax revenues (over 40% in 1999) for counties and localities. Kan. Stat. Ann. §79–3425 (2003 Cum. Supp.); see also §79–34,142 (1997) (prescribing allocation formula); 1999 Kan. Sess. Laws, ch. 137, §37. And, as indicated earlier, *supra*, at 4–5, Kansas accords the Nation no dispensation based on the Nation's sovereign status. The Nation thus receives neither a state exemption so that it can impose its own fuel tax, nor a share of the State's fuel tax revenues. Accordingly, the net result of invalidating Kansas' tax as applied to fuel distributed to the Nation Station would be a somewhat more equitable distribution of road maintenance revenues in

Kansas.

Kansas argues that, were the Nation to prevail in this case, nothing would stop the Nation from reducing its tax in order to sell gas below the market price. Brief for Petitioner 30. *Colville* should quell the State's fears in this regard. Were the Nation to pursue such a course, it would be marketing an exemption, much as the smokeshops did in *Colville*, and hence, interest balancing would likely yield a judgment for the State. See 447 U. S., at 155–157. In any event, as the Nation points out, the State could guard against the risk that "Tribes will impose a 'nominal tax' and sell goods at a deep discount on the reservation." Brief for Respondent 34–35. The State could provide a credit for any tribal tax imposed or enact a state tax that applies only to the extent that the Nation fails to impose an equivalent tribal tax. *Id.*, at 35.

Today's decision is particularly troubling because of the cloud it casts over the most beneficial means to resolve conflicts of this order. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991), the Court counseled that States and Tribes may enter into agreements establishing "a mutually satisfactory regime for the collection of this sort of tax." *Id.*, at 514; see also *Nevada* v. *Hicks*, 533 U. S. 353, 393 (2001) (O'CONNOR, J., concurring in part and concurring in judgment) (describing various state-tribal agreements); Brief for United States as *Amicus Curiae* 28–29, and n. 12; Brief for National Intertribal Tax Alliance et al. as *Amici Curiae;* Ansson, State Taxation of Non-Indians Who Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective States, 78 Ore. L. Rev. 501, 546 (1999) ("More than 200 Tribes in eighteen states have resolved their taxation disputes by entering into inter-

governmental agreements.").[12] By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.

In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas' collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation's tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.

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For the reasons stated, I would affirm the judgment of the Court of Appeals for the Tenth Circuit.

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[12] In 1992, Kansas and the Nation negotiated an intergovernmental tax compact. App. 20–26. When the initial five-year term expired, the State declined to renew the agreement. Brief for United States as *Amicus Curiae* 3–4.